

No. 10954

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a
corporation,

Appellant,

vs.

ROBERT CUMMINGS,

Appellee.

VOLUME I.

(Pages 1 to 272, inclusive.)

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

SEP 15 1945

PAUL P. O'BRIEN,
CLERK

No. 10954

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a
corporation,

Appellant,

vs.

ROBERT CUMMINGS,

Appellee.

VOLUME I.

(Pages 1 to 272, inclusive.)

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italics* the two words between which the omission seems to occur.]

	Page
Affidavit of Ivan Betts on Application for Injunction and Against Motion for Judgment.....	102
Affidavit of H. S. Brewster on Application for Injunction and Against Motion for Judgment.....	101
Affidavit of Herman D. Cook on Application for Injunction and Against Motion for Judgment.....	100
Affidavit of Robert Cummings re Preliminary Injunction	72
Exhibit A. Western Union Telegram, Dated June 3, 1943, to Universal Pictures Company, Inc., From Robert Cummings.....	76
Exhibit B. Letter, Dated June 24, 1943, to Robert Cummings From Universal Pictures Company, Inc.	77
Exhibit C. Postal Telegraph, Dated June 25, 1943, to Universal Pictures Company, Inc., From Robert Cummings	78
Exhibit D. Letter, Dated July 31, 1943, to Robert Cummings From Universal Pictures Company, Inc.	79
Exhibit E. Postal Telegraph, Dated August 2, 1943, to Universal Pictures Company, Inc., From Robert Cummings	80
Exhibit F. Letter, Dated August 28, 1943, to Robert Cummings From Universal Pictures Company, Inc.	81

Affidavit of Robert Cummings	Page
Exhibit G. Postal Telegraph, Dated September 1, 1943, to Universal Pictures Company, Inc., From Robert Cummings	82
Exhibit H. Letter, Dated September 7, 1943, to Robert Cummings From Universal Pictures Company, Inc.	83
Exhibit I. Western Union Telegram, Dated September 8, 1943, to Universal Pictures Co., Inc., From Lester Wm. Roth.....	84
Exhibit J. Letter, Dated September 10, 1943, to Universal Pictures Company, Inc., From Lester Wm. Roth	85
Exhibit K. Letter, Dated October 11, 1943, to Robert Cummings From Universal Pictures Company, Inc.	85
Exhibit L. Letter, Dated October 15, 1943, to Universal Pictures Company, Inc., From Lester Wm. Roth	87
Affidavit of Oscar R. Cummins.....	88
Affidavit (Supplementary) of Oscar R. Cummins in Support of Motion for Judgment and Against Application for Injunction	106
Affidavit of Oscar R. Cummins in Response to Affidavit of Edward Muhl.....	112
Affidavit of Daniel J. Kelley on Application for Injunction and Against Motion for Judgment.....	92
Affidavit of Bella Marco in Support of Motion for Judgment and Against Application for Injunction....	108
Affidavit of Edward Muhl	103
Affidavit of James A. Smith in Support of Motion for Judgment and Against Application for Injunction....	110
Affidavit of Robert Speers.....	64

	Page
Affidavit of B. W. Steinberg on Application for Injunction and Against Motion for Judgment.....	91
Amendment to Answer.....	115
Answer (Superior Court).....	45
Exhibit A. Letter to Robert Cummings From Universal Pictures Co., Inc.....	51
Exhibit B. Letter, Dated September 7, 1943, to Robert Cummings From Universal Pictures Co., Inc.	53
Answer to Counterclaim.....	66
Answer to Objections and Amendments to Plaintiff's Proposed Findings and Judgment.....	205
Appeal:	
Notice of	266
Supersedeas and Cost Bond.....	267
Appellant's Statement of Points on Appeal (Circuit Court)	709
Certificate of Clerk (District Court).....	270
Complaint for Declaratory and Other Relief (Superior Court)	2
Exhibit "A." Contract, Dated November 21, 1938, Between Universal Pictures Co., Inc. and Robert Cummings	20
Counterclaim	58
Findings of Fact and Conclusions of Law.....	223
Judgment	253
Memorandum of Conclusions, Dated December 31, 1943	128
Memorandum of Conclusions, Dated March 6, 1944.....	145

	Page
Memorandum of Conclusions, Dated August 21, 1944.....	216
Memorandum of Conclusions, Dated October 30, 1944.....	258
Minute Order, Dated March 6, 1944.....	198
Minute Order, Dated August 21, 1944.....	222
Minute Order, Dated October 30, 1944.....	265
Motion for New Trial.....	256
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	266
Notice of Motion for Order of Dismissal and Judgment on the Pleadings.....	214
Notice of Motion for Summary Judgment.....	70
Objections and Amendments to Proposed Findings and Judgment	199
Order for Removal to Federal Court and Stay of Proceedings (Superior Court).....	56
Order to Show Cause, Dated October 20, 1943.....	57
Petition for Removal to Federal Court.....	54
Plaintiff's Trial Memorandum of Points and Authorities and Its Objections to the Proposed Second Amendment to Defendant's Answer.....	138
Proposed Second Amendment to Answer.....	131
Reporter's Transcript of Hearing Motion of Defendant for Order of Dismissal as to 1st and 2nd Causes of Action and Judgment on the Pleadings as to the 4th Cause of Action, Pursuant to Notice Filed 5/10/44	676

Reporter's Transcript of Hearing on Order to Show Cause Why Injunction Pendente Lite Should Not Issue and Hearing on Motion for Summary Judgment	273
--	-----

Reporter's Transcript of Testimony and Proceedings on Trial	307
---	-----

Plaintiff's Exhibits:

No.

1—Telegram, Dated April 12, 1943.....	387
2—List of Telephone Conversations Between Mr. Muhl and Oscar Cummins Between April 10th and June 3rd.....	463
3—Flying Log of Robert Cummings.....	578

Defendant's Exhibits:

A—Letter, Dated November 27, 1941, to Universal Pictures Company, Inc., From Robert Cummings	506
B—Three Telegrams, Dated April 10, 1943.....	368
C—Letter, Dated April 9, 1943, to Robert Cummings From Universal Pictures Company, Inc.	448
D—List of Telephone Conversations.....	521
E—List of Pictures With Dates of Shooting.....	565

Testimony on Behalf of Plaintiff:

Cummings, Robert—

Direct examination	336
Cross-examination	336
Cross-examination (recalled)	522
Direct examination (rebuttal).....	666
Cross-examination	667

Reporter's Transcript of Testimony	Page
Testimony on behalf of Plaintiff:	
Cummins, Adeline—	
Direct examination (rebuttal).....	670
Cummins, Oscar—	
Direct examination	310
Cross-examination	314
Direct examination (rebuttal).....	524
Cross-examination	529
Cummings, Ruth K.—	
Direct examination (rebuttal).....	662
Marco, Bella—	
Direct examination	333
Smith, James—	
Direct examination	335
Testimony on Behalf of Defendant:	
Clay, Josephine—	
Direct examination	380
Cummings, Robert—	
Direct examination	490
Cross-examination	507
Redirect examination	517
Direct examination (rebuttal).....	575
Cross-examination	577
Direct examination (recalled).....	591
Cross-examination	591
Redirect examination	598
Cummins, Adeline—	
Direct examination (rebuttal).....	523
Cummins, Oscar—	
Direct examination (rebuttal).....	610
Cross-examination	611

Reporter's Transcript of Testimony	Page
Testimony on behalf of Defendant:	
James, G. B.—	
Direct examination (rebuttal).....	635
Cross-examination	639
Redirect examination	644
Recross-examination	644
Kelley, Daniel—	
Direct examination	388
Cross-examination	401
Redirect examination	413
Direct examination (recalled).....	478
Cross-examination	482
Meaney, J. E.—	
Direct examination	367
Redirect examination	370
Recross-examination	371
Redirect examination	379
Direct examination (rebuttal).....	613
Cross-examination	613
Redirect examination	634
Muhl, Edward—	
Direct examination	416
Cross-examination	443
Direct examination (rebuttal).....	562
Cross-examination	571
Redirect examination	572
Speers, Robert—	
Direct examination	345
Cross-examination	356
Direct examination (recalled).....	414
Ward, Emmett—	
Direct examination	471
Cross-examination	476

viii.

Reporter's Transcript of Testimony	Page
Testimony on behalf of Defendant:	
Yorton, Bernice—	
Direct examination	648
Cross-examination	651
Redirect examination	656
Recross-examination	656
Redirect examination	658
Stipulations of Facts.....	116
Exhibit A:	
Amendment to Contract, Dated January 30, 1941..	120
Amendment to Contract, Dated January 31, 1941..	122
Amendment to Contract, Dated December 31, 1941	125
Exhibit B:	
Notice, Dated November 15, 1943, to Robert Cummins From Universal Pictures Company, Inc.	126
Notice, Dated December 20, 1943, to Robert Cum- mings From Universal Pictures Company, Inc...	127
Supersedeas and Cost Bond.....	267
Supplementary Affidavit of Oscar R. Cummins in Support of Motion for Judgment and Against Ap- plication for Injunction.....	106

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

LOEB & LOEB,
523 West Sixth St.
Los Angeles 14, Calif.

JOSEPH L. LEWINSON
621 South Hope St.
Los Angeles 14, Calif.

For Appellee:

ROTH AND BRANNAN
621 South Hope St.
Los Angeles 14, Calif.

JOSEPH J. CUMMINS
739 South Hope St.
Los Angeles 14, Calif. [1*]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 488314

ROBERT CUMMINGS,

Plaintiff,

v.

UNIVERSAL PICTURES COMPANY, INC. a
corporation,

Defendant.

COMPLAINT FOR DECLARATORY AND OTHER
RELIEF

Plaintiff complains of defendant and alleges:

I.

Defendant is now, and was at all times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and is now, and was at all times hereinafter mentioned, qualified to do business in the State of California, with its principal office for the transaction of business in the City of Los Angeles, County of Los Angeles, State of California.

II.

On or about November 21, 1938, plaintiff and defendant entered into a written contract, a copy of which, as originally executed, is annexed hereto marked Exhibit "A" and by reference made a part hereof. Since November 21, 1938, said contract has at various and sundry times been amended by the parties. Said amendments are not, nor are any of them, pertinent [2] to the controversy

herein alleged and for that reason are not pleaded herein. Said contract (hereinafter referred to as "the contract" or "said contract") was at all times from November 21, 1938 to and including May 29, 1943, subsisting between said parties. The present controversy arises by reason of the fact that defendant contends that said contract still exists between the parties and plaintiff contends that it was terminated on May 29, 1943. Said controversy arises out of the facts hereinafter alleged.

III.

On or about April 10, 1943, defendant demanded of plaintiff that plaintiff portray the role of "Hank" in a photoplay then entitled "Fired Wife." Plaintiff refused to and did not comply with said demand. Thereafter, on April 15, 1943, defendant served a written notice upon plaintiff placing said plaintiff upon suspension. Said notice is as follows, to-wit:

"UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

April 15, 1943

Registered Mail

Mr. Robert Cummings

14111 Sherman Way

Van Nuys, California

Dear Mr. Cummings:

This is to notify you that by reason of your failure, refusal or neglect to perform your obligations under your contract of employment with us dated November 21, 1938, as heretofore amended, and particularly by reason of your failure, refusal or neglect to report to us on April 12, 1943 in accordance with our notice

to you [3] dated April 10, 1943, we elect to and do hereby exercise the right granted us under the provisions of paragraph 12 of said contract to refuse to pay you any compensation during the period of such failure, refusal or neglect.

At the time of such failure, refusal or neglect you were cast to portray a role in a photoplay, to-wit: the role of 'Hank' in the photoplay now entitled 'Fired Wife.' By reason of your failure, refusal or neglect, we are engaging another person to portray such role. We accordingly elect to and do hereby exercise the further right granted us under the provisions of said paragraph 12 of said contract to refuse to pay you any compensation until the completion of such role by such other person.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

Edward Muhl
epw:vv

By Edward Muhl
Assistant Secretary"

IV.

The role of "Hank" in the photoplay then entitled "Fired Wife" was completed by the person who had been substituted for plaintiff to portray such role on or prior to May 18, 1943. [4]

V.

On May 18, 1943, defendant served a second written notice upon plaintiff advising plaintiff that by reason of his refusal to play the role of "Hank," and his suspension as a consequence of said refusal, that the term of said contract had been extended for a period of five weeks and two days commencing April 12, 1943, and advising plaintiff that he was being further suspended. Said written notice is as follows, to-wit:

"UNIVERSAL PICTURES COMPANY, INC.
Universal City, California
May 18, 1943

Registered Mail
Mr. Robert Cummings
c/o Mr. Oscar Cummins
9441 Wilshire Boulevard,
Beverly Hills, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks and two (2) days commencing April 12, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the con- [5] tinuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

Edward Muhl
jab/j

By Edward Muhl
Assistant Secretary"

VI.

Between the dates of April 10, 1943, and May 18, 1943, both inclusive, plaintiff received no notices of any kind or nature from defendant other than the two above pleaded. No demand, oral or written, was made by defendant at any time after April 10, 1943 that plaintiff report to defendant in connection with any other picture or for any services pursuant to said contract.

VII.

On May 26, 1943, plaintiff, pursuant to the terms and provisions of said contract, appeared at the offices of the defendant and demanded of defendant payment of salary as fixed by said contract for that portion of the week beginning May 19, 1943 and ending May 22, 1943. Plaintiff alleges that Exhibit "A" provides that the pay-

ment of weekly salary by defendant to plaintiff be made on Wednesday of each week for services rendered in the preceding week from Monday to Saturday, both inclusive, [6] or for any part of such preceding week. Defendant, at said time, to-wit, on May 26, 1943, failed and refused to pay salary to plaintiff in accordance with said contract and the demand of plaintiff and did not at said time, and has not at any time since, nor has anyone on behalf of defendant, paid said salary to plaintiff in accordance with said contract and said salary has not been paid.

VIII.

Defendant's refusal and failure to pay salary to plaintiff for that portion of the week beginning on May 19th and ending on May 22nd, both dates inclusive, pursuant to the demand of plaintiff made on May 26, 1943, as aforesaid, constituted a material breach of said contract, and plaintiff did promptly, and on May 29, 1943, advise defendant in writing of said material breach and his election to terminate said contract by reason of said breach, said written notice from plaintiff to defendant being as follows, to-wit:

"Universal Pictures Co., Inc.
Universal City, California

May 29, 1943

Under date of May 18, 1943, you notified me that you considered my contract with you dated November 21, 1938, suspended for a period of 5 weeks and 2 days, commencing April 12, 1943, and you purported to exercise a right of extension with respect to said alleged suspension.

Under second paragraph of said letter, you state that said contract is further suspended after the ex-

piration of said period because of my purported failure, refusal and/or neglect to perform my obligations thereunder. As you are well aware, there has been no failure, refusal and/or neglect of my part to perform my obligations under said contract [7] at any time since the expiration of said period of 5 weeks and 2 days, assuming, without admitting, that there was such a failure with respect to said period of 5 weeks and 2 days. Assuming that you had the right of suspension for said period of 5 weeks and 2 days, such suspension would have ended on May 18, 1943. Accordingly, compensation was payable to me under said contract for the period after May 18, 1943. On May 26, 1943, (on which date compensation under said contract was payable to me), at or about 2:30 P. M., demand was made upon you for the payment of the compensation due and payable on said date.

At said time, you failed and refused to pay me the compensation which was due and payable under said contract. Such failure and refusal was a material breach by you of your obligations under said contract and I hereby notify you that I elect to and do hereby terminate said contract by reason of such failure and refusal.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which I may have in the premises, all such other rights and/or remedies being expressly reserved by me.

ROBERT CUMMINGS"

IX.

Thereafter, on June 2, 1943, defendant advised plaintiff in writing that it did not consider said contract terminated and that it did not consider that there had been any breach of said contract. Said notice from defendant to plain- [8] tiff, being as follows, to-wit:

“UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

June 2, 1943

Registered Mail .

Mr. Robert Cummings

c/o Oscar Cummins

9441 Wilshire Boulevard

Beverly Hills, California

Dear Mr. Cummings:

This is to acknowledge receipt of your telegram of June 1, 1943.

Please be advised that despite your purported termination of your contract with us, dated November 21, 1938, we will continue to treat and consider said contract as being in full force and effect.

In our notice to you under date of May 18, 1943, we notified you that your employment under said contract, as amended, would be further suspended during the continuance of your failure, refusal and/or neglect to perform your obligations thereunder.

At no time since April 12, 1943, up to and including the present time, have you notified us of your willingness to perform pursuant to the terms of said contract, as amended. If you are willing to resume

your services under said contract, as amended, please notify Mr. Muhl at our studio, and upon your reporting pursuant to such notification, we will terminate the suspension of your employment. [9] Failing such notification by you, your employment will continue in suspension during the continuance of your present failure, refusal and/or neglect to perform your obligations under said contract, as amended, and until you do report ready to resume and perform your services under said contract, as amended.

We reserve the right to extend your employment under said contract, as amended, for a period equivalent to the period of such suspension, and this notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

Edward Muhl
jab/j

By Edward Muhl
Assistant Secretary"

X.

Since May 29, 1943, there has been an interchange of notices and letters from defendant to plaintiff and from plaintiff to defendant, the purport of which is that defendant claims that said contract is still existing and subsisting between plaintiff and defendant, and plaintiff claims that said contract by reason of the material breach of defendant, as herein alleged, has been terminated by plaintiff, as of May 29, 1943, and no longer exists between them.

XI.

Plaintiff asserts that by reason of the matters and things herein alleged that an actual controversy exists between said parties and that it is necessary that the Court declare the rights of said parties growing out of the controversy herein alleged and determine whether or not said contract was terminated as of May 29, 1943, as plaintiff contends, or whether or not said contract is still subsisting and valid, as defendant contends.

And for a Second and Separate Cause of Action Plaintiff Alleges:

I.

Plaintiff hereby repeats, re-alleges and re-pleads the allegations contained in Paragraphs I to VII, both inclusive, of its first cause of action, as if fully set out herein at length.

II.

Pursuant to the terms of said contract, defendant is indebted to plaintiff for salary and compensation earned by plaintiff for that portion of the week beginning May 19, 1943 and ending May 22, 1943, both dates inclusive, and for the week beginning May 24, 1943 and ending May 29, 1943, both dates inclusive, in the sum of \$2,500.00.

III.

Plaintiff has heretofore made demand, and hereby makes demand of defendant for the payment of said \$2,500.00, and defendant has failed, refused and neglected to pay the same, or any part thereof, and the same has not, or any part thereof, been paid.

And for a Third and Separate Cause of Action, Plaintiff Alleges:

I.

Plaintiff hereby repeats, re-alleges and re-pleads, the allegations contained in Paragraphs I and II of its [11] first cause of action, as fully as if set out herein at length.

II.

Commencing with the period of approximately one year after the date of the execution of said contract between plaintiff and defendant, defendant has deliberately with malice and in bad faith embarked upon a course of action in respect of plaintiff for the purpose of using plaintiff in minor roles, and such roles as would discredit plaintiff and imperil his future, and roles which were out of character and not consistent with the abilities and talents of plaintiff and has on numerous and sundry occasions, too numerous to mention, unreasonably demanded of plaintiff that plaintiff portray roles for which he was unsuited and which would discredit plaintiff and impair his standing as an actor and has demanded of plaintiff that he render his services in photoplays which would discredit plaintiff and impair his standing as an actor, all for the sole purpose of discrediting plaintiff with the end in view of depreciating plaintiff's abilities and talents as an actor and of destroying his potential future as an actor. In this regard, plaintiff specifically alleges that the executive officers of defendant have on various and sundry occasions advised plaintiff that he was a "son-of-a-bitch" and that "they would run him ragged," and that he was a "bastard" and they "would teach him a lesson."

III.

Plaintiff entered into said contract with defendant in good faith and upon the fundamental representations made by defendant and implicit in said contract and every covenant and condition thereof, that defendant would be reasonable in its judgment affecting the use of plaintiff's services and that the defendant would exercise good faith in the use of plaintiff's services and would utilize the talents and abilities of plaintiff to their best advantage and for the mutual advantage and benefit [12] of plaintiff and defendant. Defendant has been on the contrary unreasonable in its demands upon plaintiff for the rendition of his services and has wholly failed to exercise good faith and reasonableness in its purported performance of said contract continuously from approximately one year after the date of the execution of said contract to April 10, 1943, and on the contrary has since the execution of said contract with calculation and design, in bad faith and with malice, unreasonably exploited the services of plaintiff for the sole purpose of mis-using his talents and abilities and destroying plaintiff's future as an actor.

IV.

By reason of the matters and things alleged in this third cause of action, a controversy has arisen between plaintiff and defendant as to the existence of said contract. Plaintiff asserts that the unreasonable demands of defendant herein alleged constitute material breaches of said contract and that by reason thereof plaintiff has the right to terminate said contract.

Defendant asserts that there have been no breaches of said contract and that even though breaches have occurred as herein alleged said breaches are not material

breaches and that plaintiff has no right to terminate said contract.

And for a Fourth Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff hereby repeats, re-alleges and re-pleads the allegations contained in Paragraphs I to XI, both inclusive, of his first cause of action and allegations contained in Paragraphs II to IV, both inclusive, of its third cause of action, as if fully set out herein at length.

II.

Prior to April 10, 1943, defendant advised plaintiff that it desired to utilize the services of plaintiff to portray the role of "Hank" in a photoplay then entitled "Fired Wife." Plaintiff at said time advised defendant that he would not render his services in said role of "Hank" in said photoplay for the reason that the part and the photoplay were not consonant with plaintiff's standing as an actor in the motion picture industry and that the said demand of defendant was unreasonable. Defendant agreed with the objections of plaintiff, as herein alleged, but stated to plaintiff that defendant expected to make said photoplay as a "Class A" picture and would implement and supplement the story by means of direction and personnel which were then available to defendant. Defendant at said time specifically represented to plaintiff that if plaintiff would agree to portray the role of "Hank" in said photoplay that said photoplay would be directed by an outstanding director in the motion picture industry comparable to Leo McCarey. Plaintiff alleges that Leo McCarey has been for many years and is now recognized as one of the outstanding directors

in the motion picture industry. Defendant at said time further represented to plaintiff that the other leading role in said photoplay would be portrayed by Teresa Wright and that other principal parts in said photoplay would be portrayed by Charles Coburn and Eddie "Rochester" Anderson, all of whom are outstanding performers in the motion picture industry.

Based upon said representations, and each of them, plaintiff agreed with defendant that its demand was reasonable and advised defendant that he would portray said role of "Hank" in said photoplay. On or about April 10, 1943 defendant advised plaintiff that said photoplay was to be directed by Charles Lamont and that Teresa Wright, Charles Coburn and Eddie "Rochester" Anderson would not be included in the cast of said photoplay. Plaintiff alleges that at no time prior to April 10, 1943 was [14] Charles Lamont, nor has he ever been at any time since, recognized as an outstanding director or as a director comparable to Leo McCarey. Plaintiff immediately upon receipt of said information from defendant did then and there notify defendant that he would not render his services in connection with the role of "Hank" in said photoplay but plaintiff did at the same time advise defendant that if defendant complied with the representations made by defendant as herein alleged, plaintiff would be ready, willing and able to render his services in said photoplay and would portray the role of "Hank" in said photoplay.

Plaintiff is informed and believes and upon said information and belief alleges that the principal photography on said photoplay was commenced on or about April 12, 1943 and was completed upon the expiration of five (5) weeks and two (2) days from said date. Plaintiff

alleges directly that Leo McCarey did not direct said photoplay nor did any other person recognized as an outstanding director in the motion picture industry, or as a director comparable to Leo McCarey, direct said photoplay. Teresa Wright, Charles Coburn, and Eddie "Rochester" Anderson did not, nor did any of them, portray or play any of the roles in said photoplay.

III.

Since May 18, 1943, several written notices have been transmitted from defendant to plaintiff. Defendant in said written notices further purports to suspend plaintiff, setting forth as the reason therefor the purported failure of plaintiff to comply with the demand of defendant to portray the role of "Hank" in the photoplay "Fired Wife" as alleged in Paragraph II hereof, and defendant asserts in its said written notices that as a consequence of said purported failure of plaintiff that defendant has the right to and has placed plaintiff upon continuing suspension, and has the right to and has extended the [15] term of said contract for the period of said continuing suspension.

Plaintiff alleges that he was ready, able, and willing to render his services to defendant in accordance with the terms of said contract at all times from April 10, 1943 to and including May 29, 1943, on which last mentioned date plaintiff voluntarily terminated said contract for the reasons alleged in the first cause of action pleaded herein.

IV.

By reason of the matters and things herein alleged an actual controversy exists between said parties. Plaintiff asserts that he has not breached said contract in any particular and that defendant had no right to place plain-

tiff upon suspension as it purports to have done by its notice of May 18, 1943, or for any length of time whatsoever, and further that defendant has no right to purport to extend said contract for the period of said purported extensions, or any of them.

Defendant asserts that plaintiff has breached said contract and that defendant was within its rights in purporting to suspend plaintiff, as set forth in its letter dated May 18, 1943, and is within its right to place plaintiff upon continuing suspension and to keep plaintiff upon continuing suspension, as alleged in Paragraph III hereof, until plaintiff reports back to defendant ready, able and willing to render his services in such capacity as defendant may direct, and further that defendant has the right to extend said contract for the period of all of said purported suspensions.

Plaintiff asserts that he was at all times since April 10, 1943 to and including May 29, 1943, ready, able and willing to render his services pursuant to the terms of said contract.

Defendant asserts that plaintiff was not ready, [16] able or willing to render services to defendant as required by said contract at any time after April 10, 1943.

Plaintiff asserts that said contract was at all times in full force and effect prior to April 10, 1943 and from April 10, 1943 to and including May 18, 1943, and that pursuant to the terms of said contract plaintiff was entitled to salary in the sum of \$1,500.00 per week as provided by said contract. Plaintiff alleges in this regard that from April 12, 1943 to and including May 18, 1943, salary due and owing to plaintiff from defendant amounted to the sum of \$7,750.00, no part of which has been paid.

Defendant asserts that by reason of the purported suspension of said contract by defendant, by its notice of

May 18, 1943 as herein alleged, defendant was not under any obligation to pay to plaintiff salary as required by said contract from April 12, 1943 to and including May 18, 1943.

Plaintiff asserts that defendant by its notice of May 18, 1943 and its subsequent notices as herein alleged purporting to suspend plaintiff and extend said contract, its persistent refusal and omission to pay to plaintiff compensation due to plaintiff from April 12, 1943 to May 18, 1943, both dates inclusive, its persistent refusal and its failure to pay to plaintiff compensation from May 19, 1943 to May 29, 1943, both dates inclusive, and defendant's unreasonable demands upon plaintiff constitute material breaches of said contract, as a consequence of which plaintiff has the right to terminate said contract.

Defendant denies that its conduct in respect of said breaches, or any of them, gives to plaintiff the right to terminate said contract.

Plaintiff asserts that by reason of the breaches herein alleged that a material part of the consideration of said [17] contract has failed, and that as a consequence of said material failure of consideration plaintiff has the right to rescind said contract and that said contract should be rescinded. In this connection, plaintiff alleges that plaintiff has received nothing of value under said contract from defendant other than reasonable compensation for services already rendered and that there is nothing to return or offer to return to defendant. Plaintiff, however, does hereby offer to do and perform any and all things in connection with a rescission of said contract which to the court may seem just and equitable as conditions precedent to a rescission thereof.

Defendant asserts that said alleged breaches do not constitute a material failure of consideration and that

plaintiff has no right to rescind said contract and that no rescission of said contract should be decreed.

Wherefore, plaintiff prays judgment as follows:

(1) That the contract dated November 21, 1938, as amended, be declared by the court to have been terminated by defendant on May 29, 1943, that since May 29, 1943 said contract has been terminated, and that said parties have no contractual rights or duties each to the other by virtue of said contract, as amended, since May 29, 1943.

(2) Said contract be declared terminated and at an end, by reason of the unreasonable demands and bad faith of defendant in its alleged performance of said contract, and that it be declared that said parties have no contractual rights or duties one to the other from the date of the judgment herein.

(3) That the court declare a rescission of said contract by reason of a material failure of consideration on such terms if any, as to the court may seem just and equitable. [18]

(4) For the sum of \$2,500.00 compensation or salary due from defendant to plaintiff from May 19, 1943 to May 22, 1943, both dates inclusive.

(5) For the sum of \$7,750.00 compensation or salary due from defendant to plaintiff from April 12, 1943 to May 18, 1943, both dates inclusive.

(6) Cost of suit and such other and further relief as to the court may seem meet and proper in the premises.

ROTH AND BRANNEN and
JOSEPH J. CUMMINS

By Lester Wm. Roth

Attorneys for Plaintiff [19]

EXHIBIT "A"

November 21, 1938

Universal Pictures Company, Inc.

Universal City, California

Gentlemen:

This will confirm the following agreement between us:

(1) Concurrently with the execution hereof you have entered into an agreement with me for my services in your photoplay now entitled "Three Smart Girls Grow Up." As a material part of the consideration inducing you to enter into said agreement executed concurrently herewith I hereby give and grant to you the right or option to engage me to render my services for you upon the terms, covenants and conditions set forth in that certain contract hereunto attached, which contract is hereby referred to and by this reference made a part hereof.

(2) The foregoing option may be exercised by you at any time up to and including the expiration of thirty (30) days after the first public preview of said photoplay now entitled "Three Smart Girls Grow Up" or at any time up to and including, but not later than, two (2) days after the date of delivery at your New York office of the first print of said completed photoplay, whichever is earlier. Notwithstanding the foregoing, it is agreed that if for any reason you do not use or require my services in connection with said photoplay "Three Smart Girls Grow Up," the foregoing option shall not lapse or terminate but shall remain in full force and effect and in such case said option may be exercised by you at any time prior to the expiration of thirty (30) days after the payment to me of the minimum guarantee specified in

paragraph 6 of my contract with you executed concurrently herewith, relating to said photoplay "Three Smart Girls Grow Up." Notice of the exercise of said option shall be in writing and may be served upon me by depositing such notice in the United States mail addressed to me c/o Stanley Bergerman & Company, 9165 Sunset Boulevard, West Hollywood, California, or at such other address as I may from time to time indicate in writing, or if you so desire, such notice may be served by telegraph, addressed to be as aforesaid, or by personal delivery. The date of the deposit of such notice in the United States mail or the date of the delivery of the same by you to the telegraph company or the date of personal delivery, as the case may be, shall be the date of the service of such notice.

(3) I have affixed my signature to the contract hereunto attached. In the event you exercise the option herein granted to you, my signature to said contract shall be final and effective and said contract shall be and constitute a final and binding agreement between us, but should you not exercise the option herein granted to you, then my signature to said contract shall be of no effect.

If the foregoing is in accordance with your understanding and agreement, kindly indicate your approval and acceptance thereof in the space hereinbelow provided.

Yours very truly,

(signed) ROBERT CUMMINGS

Approved and accepted;
universal pictures company, inc.

by: (signed) CLIFF WORK
Vice President

And: (signed) EDWARD MUHL
Assistant Secretary [20]

UNIVERSAL PICTURES COMPANY, INC.

Agreement executed at Universal City, California, November 21, 1938, by and between Universal Pictures Company, Inc., a Delaware corporation, hereinafter referred to as the "producer", and Robert Cummings, hereinafter referred to as the "artist",

Witnesseth:

For and in consideration of the covenants, conditions and agreements hereinafter contained and set forth, the parties hereto have agreed and do hereby agree as follows:

1. The producer hereby employs the artist to render his exclusive services as herein required for and during the term of this agreement and the artist hereby accepts such employment and agrees to keep and perform all of the duties, obligations and agreements assumed and entered into by him hereunder.

2. The artist agrees that throughout the term hereof he will render the services hereinafter specified, solely and exclusively for and as requested by the producer; that he will render his services as an actor in such roles and in such photoplays and/or other productions as the producer may designate; that he will make personal appearances in motion picture theatres and/or other places of entertainment and/or will render his services as an actor in vaudeville, plays and/or in all other kinds of performances on the speaking stage; that he will render his services as a radio performer, not only by broadcasting in person, but also by making electrical transcriptions and/or by any other present or future methods or means; that he will render his services as an actor in television productions; and that he will render his services in con-

nection with the broadcasting and/or transmission of his likeness and/or voice by means of television, radio and/or otherwise, whether such broadcasting and/or transmission be either directly or indirectly in connection with or independent of photoplays. The artist further agrees that he will promptly and faithfully comply with all reasonable instructions, directions, requests, rules and regulations made or issued by the producer in connection with the services to be performed by the artist hereunder; and that he will perform and render his services hereunder conscientiously and to the full limit of his ability and as instructed by the producer at all times and wherever required or desired by the producer. The term "photoplays" as used in this agreement shall be deemed to include, but not be limited to, motion picture productions produced and/or exhibited and/or transmitted with sound and voice recording, reproducing and/or transmitting devices, television, radio devices and all other improvements and devices which are now or hereafter may be used in connection with the production and/or exhibition and/or transmission of any present or future kind of motion picture productions.

3. The artist further agrees that during the term hereof he will not render his services as an actor, or pose, act, appear, write, direct or render any other services in any way connected with motion pictures or photoplays, nor will he render any services of any kind or character whatsoever, in any way connected with dramatic, theatrical, musical, vaudeville, radio, television or other productions, shows, performances and/or entertainment, nor will he render any other similar services to or for himself, or to or for any other person, firm or corporation other than the producer, without the written consent of the producer first had and obtained. The artist further agrees that

he will not consent to nor permit any other person to advertise, announce or make known, directly or indirectly, by paid advertisements, press notices, or otherwise, that he has contracted to do or perform any act or services contrary to the terms of this agreement. The producer shall have the right to institute any legal proceedings, in the name of the artist or otherwise, to prevent such acts, or any of them.

4. The artist expressly gives and grants to the producer the sole and exclusive right to photograph and/or otherwise reproduce any and all of his acts, poses, plays and appearances of any and all kinds during the term hereof, and to record his voice and all instrumental, musical and other sound effects produced by him, and to reproduce and/or transmit the same, either separately or in conjunction with such acts, poses, plays and appearances, as the producer may desire; and further gives and grants to the producer solely and exclusively all rights of every kind and character whatsoever in and to the same, or any of them, perpetually, including as well the perpetual right to use the name of the artist and pictures or other reproductions of the artist's physical likeness, and recordings and reproductions of the artist's voice, in connection with the advertising and exploitation thereof, as well as in connection with the advertising and/or exploitation of any other services which may be required of the artist hereunder. The producer shall have the right to "dub" the voice of the artist and all instrumental, musical and/or other sound effects to be produced by the artist to such extent as may be desired by the producer, such dubbing of the artist's voice to be in English and/or in any other language or languages designated or desired by the producer. The producer shall also have the right to use a "double" for the acts,

poses, plays and appearances of the artist to such extent as may be desired by the producer. The artist does also hereby grant to the producer, during the term hereof, the sole and exclusive right to make use of, and to allow others to make use of, his name for advertising, commercial and/or publicity purposes (other than in connection with the acts, poses, plays and appearances of the artist hereunder), as well as the sole and exclusive right to make use of and distribute, and to allow others to make use of and distribute, his pictures, photographs or other reproductions of his physical likeness and of his voice for like purposes. The artist shall at no time during said term grant the right to, authorize or willingly permit any person, firm or corporation other than the producer to make use of his name or to make use of or distribute his pictures, photographs or other reproductions of his physical likeness or of his voice, and authorizes the producer, in the name of the artist or otherwise, to institute any proper legal proceedings to prevent such acts, or any of them.

5. The artist agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.

6. The artist hereby expressly gives and grants to the producer the right to lend the services of the artist to any other person or persons, in any capacity in which the artist is required to rendered his services hereunder, upon the distinct understanding and condition, however, that

this contract shall, nevertheless, continue in full force and effect and that the artist shall not be required to do any act or perform any services contrary to the provisions of this agreement. Any breach by any such person, however, of any of the terms of this [21] agreement shall not constitute a breach by the producer of its obligations or covenants under this agreement, nor shall the artist have the right to terminate this agreement by reason of any such breach by any such person, but the artist, at his option, in the event of such breach by any such person, shall be released from the obligation to render further services to such person. In the event that the artist is required to render services for any other person or persons as hereinabove provided, he agrees to render the same to the best of his ability. Should the services of the artist be loaned to any other person or persons hereunder, such other person or persons, at the option of the producer, shall be entitled to all or any of the advertising and other rights in connection with services rendered by the artist for such other person or persons as are given to the producer under the terms of this agreement.

Rider to Paragraph 6

It is understood and agreed that the right granted to the producer under the provisions of this paragraph 6 shall be limited to the right to lend the services of the artist to any so-called "major" producer of photoplays or to any so-called "independent" producer whose photoplays are released or distributed by or through a "major" releasing or distributing organization.

7. In the event that the producer desires, at any time or from time to time, to apply, in its own name, or otherwise, but at its own expense, for life, health, accident or other insurance covering the artist, the artist agrees that

the producer may do so and may take out such insurance for any sum which the producer may deem necessary to protect its interests hereunder. The artist shall have no right, title or interest in or to such insurance, but agrees, nevertheless, to assist the producer in procuring the same by submitting to the usual and customary medical and other examinations and by signing such applications and other instruments in writing as may reasonably be required by such insurance company or companies.

8. In the event that by reason of mental or physical disability, or otherwise, the artist shall be incapacitated from fully performing the terms hereof or complying with each and all of his obligations hereunder, or in the event that he suffer any facial or physical disfigurement materially detracting from his appearance on the screen or interfering with his ability to perform properly his required services hereunder, or in the event that his present facial or physical appearance be materially altered or changed, or in the event that he suffer any impairment of his voice, then in either or any of said events this agreement shall be suspended during the period of such disability or incapacity or facial or physical disfigurement or change of present facial or physical appearance, or impairment of voice, and no compensation need be paid the artist during the period of such suspension. The term of this agreement, and all of its provisions herein contained, may be extended, at the option of the producer, for a period equivalent to all or any part of the period of such suspension. The producer, at its option, in the event of the continuance of such disability or incapacity or facial or physical disfigurement or change of present facial or physical appearance or impairment of voice for a period or aggregate of periods in excess of three (3) weeks during the term hereof, may cancel and terminate

this employment. The producer shall have the right, at its option, to have medical examinations of the artist made at any time and from time to time by such physician or physicians as the producer may designate.

9. In the event that at any time during the term hereof of the producer, or any person to whom the services of the artist are loaned by the producer hereunder, should be materially hampered, interrupted or interfered with in the preparation, production or completion of photoplays by reason of any fire, casualty, lockout, strike, labor conditions, unavoidable accident, riot, war, act of God, or by the enactment of any municipal, state or federal ordinance or law, or by the issuance of any executive or judicial order or decree, whether municipal, state or federal, or by any other legally constituted authority, or by any national or local emergency or condition, or by any other cause of the same or any similar kind or character, or if by reason of the illness or incapacity of any principal member of the cast (other than the artist) or of the director of any photoplay in which the artist is rendering or is scheduled to render services, the production of such photoplay is suspended, interrupted or postponed, or if for any reason whatsoever the majority of the motion picture theatres in the United States shall be closed for a week or any period in excess of a week, then and in any of said events this agreement, at the option of the producer, may be suspended, likewise during the continuance of such event or events, and no compensation need be paid the artist during the period of such suspension; and the term of this agreement, at the option of the producer, may be continued and extended, upon the same terms and conditions as shall then be operative hereunder, for a period equivalent to all or any part of any period or periods during which any such event or

events shall continue. If such suspension or suspensions should continue for a period or aggregate of periods in excess of twelve (12) weeks during the term hereof, then and in that event either the artist or the producer, at his or its option, may elect to terminate the artist's employment hereunder; provided, however, that should the artist desire to elect to terminate his employment he shall serve notice of such desire upon the producer, and if the producer should not resume the payment of the weekly compensation hereinafter specified, commencing as of not later than one (1) week after the receipt of such notice from the artist, then and in that event the employment of the artist hereunder shall be terminated. If the producer should resume the payment of such compensation, commencing as of not later than one (1) week after the receipt of such notice, then and in that event the employment of the artist hereunder shall not be terminated, but shall continue in full force and effect.

10. The artist warrants and represents to the producer and agrees that the artist is and shall be a member in good standing of Screen Actors Guild, Inc., and will remain so for the duration of this contract.

11. Notwithstanding anything elsewhere contained herein, it is expressly agreed that if at the time of the expiration of this agreement the artist is engaged in a photoplay or photoplays or in the rendition of any of his other required services hereunder, and if the producer shall not then have exercised an option for the further services of the artist for a further period, then and in that event the artist's employment hereunder, at the option of the producer, may be continued and extended, at the same rate of salary and upon the same conditions as shall be operative hereunder immediately prior to the time of such expiration, until the completion of such

of the artist's required services hereunder as the producer may desire in connection therewith, not exceeding sixty (60) days. If, after the expiration of this employment, the producer should desire the services of the artist in making retakes, added scenes, sound track or any change or changes in any photoplay in which the artist shall have appeared during his employment hereunder, then and in either of said events the artist agrees to render such services in connection therewith as and when the producer may request, unless the artist is otherwise employed, but if otherwise employed the artist will cooperate to the fullest extent in the making of such retakes, added scenes, sound track and/or changes, and for services actually rendered in the making thereof the artist shall be paid at the same rate of compensation as the artist was receiving immediately prior to the expiration of this employment, except that such compensation shall be paid only for the days on which the artist is actually so employed.

12. It is distinctly understood and agreed by and between the parties hereto that the services to be rendered by the artist under the terms hereof, and the rights and privileges granted to the producer by the artist under the terms hereof, are of a special, unique, unusual, extraordinary and intellectual character which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, [22] and that a breach by the artist of any of the provisions contained in this agreement will cause the producer irreparable injury and damage. The artist hereby expressly agrees that the producer shall be entitled to injunctive and other equitable relief to prevent a breach of this agreement by the artist. Resort to injunctive and other equitable relief, however, shall not be construed

as a waiver of any other rights that the producer may have in the premises, for damages or otherwise. In the event of the failure, refusal or neglect of the artist to perform or observe any of his obligations hereunder to the full limit of his ability or as instructed, the producer, at its option, shall have the right to cancel and terminate this employment, may refuse to pay the artist any compensation during the period of such failure, refusal or neglect on the part of the artist, and shall likewise have the right to extend the term of this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues. If, at the time of such failure, refusal or neglect, the artist shall have been cast to portray a role in a photoplay, or shall have been directed to render any other of his required services hereunder, then and in either of said events the producer shall have the right to refuse to pay the artist any compensation during the time which would have been reasonably required to complete the portrayal of said role and/or to render such other services, or (should another person be engaged to portray such role or to render such other services) until the completion of such role or such other services by such other person; and in any or either of such events the producer shall also have the right to extend the term of this agreement and all of its provisions for a like period of time or for any portion thereof. Should the producer notify the artist that the artist has been cast to portray a role in a photoplay or to perform any other of his required services hereunder, and should the artist thereupon or at any time prior to the designated date of commencement of the rendition of such services advise the producer that the artist does not intend to render such services, the producer shall thereupon or at any time

thereafter have the right to refuse to pay the artist any compensation commencing as of the date on which the artist has so advised the producer of his intent not to perform, or, at the producer's election, as of any time thereafter, and continuing until the expiration of the time which would have been reasonably required to complete the portrayal of said role and/or to render such other services, or (should another person be engaged to portray such role or to render such other services) until the completion of such role or of such other services by such other person; and in any or either of such events the producer shall also have the right to extend the term of this agreement and all of its provisions for a like period of time or for any portion thereof. Any period during which the producer is entitled to refuse to pay compensation to the artist pursuant to any of the provisions of this paragraph shall, unless sooner terminated, end if and when the artist shall be requested by the producer to and shall render other services hereunder. The producer shall also have the right, at its option, to extend the term of this agreement and all of its provisions for a period of time equivalent to all or any part of any leave or leaves of absence granted the artist by the producer during the term hereof. Each and all of the several rights, remedies and options of the producer contained in this agreement shall be construed as cumulative and no one of them as exclusive of the others or of any right or priority allowed by law. All options granted to the producer herein for extending the term of this agreement, other than the options hereinafter in paragraph 23 specifically set forth, may be exercised by the producer by notice in writing to be served upon the artist at any time prior to the expiration of the term hereof.

13. If this agreement be suspended or if the producer refuse to pay the artist compensation, pursuant to any right to do so herein granted to the producer, or if the producer grant any leave of absence to the artist, and if in connection with such suspension, refusal to pay or leave of absence, the producer shall exercise the right to extend this agreement for a period equivalent to all or any part of the period of such suspension, refusal to pay or leave of absence, then and in that event the running of the then current term or period of the artist's employment hereunder shall be deemed to be interrupted during the period of such suspension, refusal to pay or leave of absence, but shall be resumed immediately upon the expiration of such suspension or leave of absence or (in case of any such refusal to pay) upon the resumption of the payment of compensation, and (subject to subsequent extension or termination for proper cause) shall continue from and after the date of such resumption for a period equal to the unexpired portion of such term or period at the time of the commencement of such suspension, refusal to pay or leave of absence, less a period equal to that portion, if any, of the period of such suspension, refusal to pay or leave of absence, for which the producer does not exercise the right to extend this agreement. In the event of any such extension the dates for the exercise of any subsequent options and the dates of the commencement of any subsequent optional period or periods of employment hereunder shall be postponed accordingly. During the period of any such suspension, refusal to pay or leave of absence the artist shall not have the right to render his services to or for any person, firm or corporation other than the producer without the written consent of the producer first had and obtained. Should the producer pay any money or compensation to the artist for or dur-

ing all or any part of any period in which this agreement is suspended, or in which the artist is not entitled to compensation, or in which the producer is entitled to refuse to pay compensation to the artist, then and in that event, at the option of the producer, the money and/or compensation so paid the artist shall be returned by the artist to the producer on demand, or the same may be deducted by the producer from any compensation earned hereunder by the artist after such period, but this provision shall not be deemed to limit or exclude any other rights of credit or recovery, or any other remedies, the producer otherwise may have. Wherever in this agreement reference is made to the phrases "the term hereof", "the term of this agreement", or other phrases of like tenor, such reference (unless a different meaning clearly appears from the context) shall mean and be deemed to refer to the original period of the artist's employment hereunder and/or to whichever of the optional periods of employment provided for in paragraph 23 hereof may be current at the time referred to.

14. No waiver by the producer of any breach of any covenant or provision of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant or provision.

15. All notices which the producer is required or may desire to serve upon the artist under or in connection with this agreement may be served by addressing the same to the artist at such address as may be designated from time to time in writing by the artist, or if no such address be designated in writing by the artist, or, if having designated an address, the artist cancels the same and fails to designate a new address, then by addressing the same to the artist at any place where the producer has a studio

or an office and, in any case, by depositing the same so addressed, postage prepaid, in the United States mail, or by sending the same so addressed by telegraph or cable, or, at its option, the producer may deliver the same to the artist personally, either in writing or, unless otherwise specified herein, orally. If the producer elect to mail such notice or to send the same by telegraph or cable, then the date of mailing thereof, or the date of delivery thereof to the telegraph or cable office, as the case may be, shall be the date of the service of such notice.

16. Nothing in this contract contained shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision of this agreement and any material statute, [23] law or ordinance contrary to which the parties have no legal right to contract, the latter shall prevail, but in such event the provision of this agreement affected shall be curtailed and limited only to the extent necessary to bring it within the legal requirements.

producer

17. The _____ agrees to furnish all modern wardrobe for _____ artist _____

robe and wearing apparel necessary for any and all roles to be portrayed by the artist hereunder; it being agreed, however, that should so-called "character" or "period" costumes be required the producer shall supply the same. It is distinctly understood and agreed, however, that in no event shall the producer be required to furnish shoes, hosiery, or underclothing for the artist; but the artist shall supply at his own expense all shoes, hosiery and underclothing (other than "character" or "period" shoes, hosiery or underclothing) necessary for any and all roles to be portrayed by him hereunder. All costumes, apparel, and other articles furnished or paid for by the producer

pursuant to the terms of this agreement, or otherwise, shall be and remain the property of the producer and shall be returned promptly to it.

18. The services of the artist hereunder are to be rendered at such place or places as may from time to time be designated by the producer. When the artist is required to render his services on location the producer agrees to furnish such necessary and reasonable meals and transportation as may reasonably be required for the artist during and on account of the rendition of such services and where, in the judgment of the producer, it is necessary for the artist to remain on such location overnight, the producer agrees to furnish necessary lodging for the artist. The artist shall not be deemed to be on location when rendering services at or near the studio then generally used by the producer as the base for the production of its photoplays.

19. The artist expressly agrees that until the expiration of the term hereof he will be available at all times in Los Angeles, California, or at any other place the producer may designate, unless excused in writing by the producer. The artist further agrees that if and when requested by the producer to do so, he will report at the producer's studio, or at any other place the producer may designate, for wardrobe fittings, publicity interviews, publicity photograph sittings, making tests and/or "stills", and for such discussions as the producer may deem necessary or desirable; it being understood, however, that no compensation whatsoever shall be or become payable to the artist for the compliance by the artist with such request of the producer.

20. Where necessary herein, all terms used in the masculine gender shall apply to the feminine gender.

~~21. The producer may transfer or assign all or any part of its rights hereunder to any person, firm or corporation, and this agreement shall inure to the benefit of the producer, its successors or assigns.~~

Rider

21. The producer may transfer or assign all or any part of its rights hereunder to any so-called "major" producer of photoplays or to any so-called "independent" producer whose photoplays are released or distributed by or through a "major" releasing or distributing organization, and this agreement shall inure to the benefit of the producer, its successors or assigns.

22. On condition that the artist shall fully and completely keep and perform each and every term and condition of this agreement on his part to be kept or performed, the producer agrees to compensate the artist therefor and for all rights herein granted and/or agreed to be granted by the artist to the producer at the rate of—Six Hundred— Dollars (\$600.00) per week, payable for each week during which the artist shall have actually rendered his services hereunder (other than as provided in paragraph 19 hereof) either in connection with the production of a photoplay or photoplays or in the performance of any of his other required services hereunder. Conditioned as aforesaid, the producer agrees that compensation will be paid to the artist for a period or aggregate of periods of not less than Twenty (20) during the original term hereof and for a period or aggregate of periods of not less than twenty (20) weeks during each six (6) months optional period of employment for which an option is exercised hereunder, and for a period or aggregate of periods of not less than forty (40) weeks during each one (1) year optional period of em-

ployment for which an option is exercised hereunder; provided, however, that the foregoing shall be deemed to have been fully complied with in any year of this agreement for which compensation shall be paid to the artist for a period or aggregate of periods of forty (40) weeks. In computing compensation to be paid or deducted with respect to any period of less than a week, the weekly rate shall be prorated, and for this purpose the rate per day shall be one-sixth ($1/6$) of the weekly rate. For the purposes of this paragraph the term "year of this agreement" shall be deemed to mean any period of three hundred sixty-five (365) consecutive days. If during the original term hereof or during any optional period of employment for which an option is exercised hereunder, this agreement be suspended, pursuant to any provision for suspension herein contained, or if the producer refuse to pay the artist compensation pursuant to any right to do so herein granted to the producer, then the minimum periods hereinabove specified, during which the producer is obligated to pay compensation to the artist, shall be reduced by a period equivalent to the period or aggregate of periods of such suspension or suspensions or refusal to pay. Any compensation due the artist hereunder shall be payable on Wednesday of each week for services rendered up to and including the Saturday preceding. During any period or periods in which the artist is not entitled to compensation pursuant to the provisions of this paragraph, he shall be deemed to be laid off without pay, and during such periods, of course, the artist shall not have the right to render his services for any person, firm or corporation without the written consent of the producer first had and obtained. Any such layoff of the artist shall be for a period of at least one (1) consecutive week subject to recall for retakes and

added scenes, but if there remains insufficient time at the end of the term hereof to lay the artist off for a period of at least one (1) consecutive week during the balance of said term, the producer may, nevertheless, lay off the artist for the remaining unexpired balance of said term even though such balance be less than one (1) week. During any such layoff period the producer may recall the artist for retakes and added scenes. For the purposes of the preceding two sentences any period or periods during which the artist is not entitled to compensation pursuant to the provisions of paragraphs 8, 9 or 12 hereof shall not be deemed to be layoff periods. [24]

22a. On condition that the artist fully and completely keeps, performs and observes each and every term, covenant and condition of this agreement on his part to be kept, performed and observed, the producer agrees to give the artist credit as a featured player on the screen in connection with the original English language version of each photoplay in which the artist appears hereunder. The producer shall not be obligated to give the artist credit in connection with foreign versions, whether the same be so-called "remakes" or "dubbed" versions, of any such photoplay. Nothing herein contained shall be construed so as to prevent so-called "trailer" and/or other advertising on the screen without mentioning the name of the artist, and no casual or inadvertent failure to comply with the provisions of this paragraph shall constitute a breach of this agreement.

23. The term of employment hereunder shall commence on a date to be designated by the producer, which date shall not be later than the day next following the latest

date on which the option granted to the producer under the terms of that certain agreement dated November , 1938, between the artist and the producer, can be exercised, and shall continue for a period of six (6) months from and after said date.

~~23.~~ The term of employment hereunder shall
 commence on ;
~~19~~ , and shall continue for a period of
 () from and after said date. In con-
 sideration of the execution of this agreement by the pro-
 ducer and of the consent of the producer to the amount
 of compensation herein set forth, the artist hereby gives
 and grants to the producer the following rights or options:

(a) To extend the term of employment of the artist for an additional period of Six (6) Months from and after the expiration of the term hereinbefore specified, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this first extended period at the rate of —Six Hundred— Dollars (\$600.00) per week.

(b) To extend the term of employment of the artist for an additional period of One (1) Year from and after the expiration of said first extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this second extended period at the rate of —Seven Hundred Fifty— Dollars (\$750.00) per week.

(c) To extend the term of employment of the artist for an additional period of One (1) Year from and after

the expiration of said second extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this third extended period at the rate of —One Thousand—Dollars (\$1000.00) per week. [25]

(d) To extend the term of employment of the artist for an additional period of One (1) Year from and after the expiration of said third extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this fourth extended period at the rate of —Fifteen Hundred—Dollars (\$1500.00) per week.

(e) To extend the term of employment of the artist for an additional period of One (1) Year from and after the expiration of said fourth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this fifth extended period at the rate of —Two Thousand—Dollars (\$2000.00) per week.

(f) To extend the term of employment of the artist for an additional period of One (1) Year from and after the expiration of said fifth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this sixth extended period at the rate of —Twenty-five Hundred— Dollars (\$2500.00) per week.

(g) To extend the term of employment of the artist for an additional period of One (1) Year from and after the expiration of said sixth extended period, upon the

same terms and conditions as herein contained, except that compensation shall be paid to the artist for this seventh extended period at the rate of —Three Thousand— Dollars (\$3000.00) per week.

(h) To extend the term of employment of the artist for an additional period of ()
from and after the expiration of said seventh extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this eighth extended period at the rate of Dollars (\$) per week.

(i) To extend the term of employment of the artist for an additional period of ()
from and after the expiration of said eighth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this ninth extended period at the rate of Dollars (\$) per week.

(j) To extend the term of employment of the artist for an additional period of ()
from and after the expiration of said ninth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this tenth extended period at the rate of Dollars (\$) per week.

(k) To extend the term of employment of the artist for an additional period of () from and after the expiration of said tenth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this eleventh extended period at the rate of Dollars (\$) per week.

(l) To extend the term of employment of the artist for an additional period of () from and after the expiration of said eleventh extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this twelfth extended period at the rate of Dollars (\$) per week.

(m) To extend the term of employment of the artist for an additional period of () from and after the expiration of said twelfth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this thirteenth extended period at the rate of Dollars (\$) per week.

Each option hereinbefore referred to may be exercised separately at least thirty (30) days prior to the expiration of the respective next preceding period of employ-

ment, or the producer, at any time, but at least thirty (30) days prior to the expiration of the term hereof or of any extension thereof; may elect to exercise all or any of the options not already exercised, in which event the term of this agreement shall be extended by the period or periods specified in the option or options so exercised by the producer. The exercise by the producer of any one or more of said options shall not be construed as an election by it not to exercise the remaining options. All notices of the exercise of any option shall be in writing and shall be served upon the artist within the periods above specified.

In Witness Whereof, the parties hereto have executed this agreement the day and year first above written.

UNIVERSAL PICTURES COMPANY, INC.

By (signed) CLIFF WORK

Vice-President

And (signed) EDWARD MUHL

Assistant Secretary

(signed) ROBERT CUMMINGS

(Robert Cummings)

(Artist) [26]

[Verified.]

[Endorsed]: Filed Sep. 23, 1943, 1:08 p. m. J. F. Moroney, County Clerk; by M. Enfield, Deputy.

[Endorsed]: Endorsed: Filed Oct. 20, 1943. [27]

[Title of Superior Court and Cause.]

ANSWER

Defendant Universal Pictures Company, Inc. answers the complaint herein as follows:

Answer to First Cause of Action

I.

Defendant admits the allegations contained in paragraph I of the first cause of action of said complaint.

II.

Referring to paragraph II of said first cause of action defendant admits the allegations with regard to the execution of the contract annexed to said complaint and marked Exhibit A; admits that since November 21, 1938, said contract has at various and sundry times been amended by the parties and admits that said contract was subsisting between said parties at all times from November 21, 1938 to and including May 29, 1943, [28] and alleges that said contract is still subsisting and in full force and effect between said parties. Except for the foregoing express admissions defendant has not sufficient information or belief upon the subject to enable it to answer the allegations contained in said paragraph II, and therefore, and placing its denial upon that ground, denies each and all of the allegations contained therein except as hereinabove admitted.

III.

Defendant admits the allegations contained in paragraph III of said first cause of action.

IV.

Referring to paragraph IV of said first cause of action defendant admits and alleges that the portrayal of the role of Hank was completed on or about May 19, 1943.

V.

Defendant admits that on May 18, 1943, it served a written notice upon plaintiff, a copy of which notice is set out in full in paragraph V of the first cause of action. Except for the foregoing express admission defendant denies each and all of the allegations contained in said paragraph V.

VI.

Referring to paragraph VI of said first cause of action defendant admits that between the dates of April 10, 1943 and May 18, 1943, both inclusive, it sent to plaintiff no written notices of any kind except as set forth in said complaint. Except for the foregoing express admission defendant denies each and all of the allegations contained in said paragraph VI.

VII.

Referring to paragraph VII of said first cause of action defendant admits that Exhibit A attached to said complaint provides that any compensation due plaintiff was and is payable on Wednesday of each week for services rendered up to and [29] including the Saturday preceding, and defendant further admits that it failed and refused to pay any salary to plaintiff on May 26, 1943 and has failed and refused to pay any salary to plaintiff since said date for the reason that plaintiff has been under suspension during all of said time for failure to comply with the provisions of the contract of November 21, 1938 and amendments thereof referred to in para-

graph II of said first cause of action. Except for the foregoing express admissions defendant denies each and all of the allegations contained in said paragraph VII.

VIII.

Defendant admits the receipt of the written notice dated May 29, 1943 and set forth in paragraph VIII of said first cause of action. Except for the foregoing express admission defendant denies each and all of the allegations contained in said paragraph VIII.

IX.

Defendant admits giving the written notice to plaintiff dated June 2, 1943 and set forth in paragraph IX of said first cause of action. Except for the foregoing express admission defendant denies each and all of the allegations contained in said paragraph IX.

X.

Defendant denies the allegations contained in paragraph XI of said first cause of action.

Answer to Second Cause of Action

I.

Defendant hereby repeats paragraphs I to VII inclusive of its answer to the first cause of action and incorporates the same herein as if set out in full. [30]

II.

Defendant denies the allegations contained in paragraph II of said second cause of action.

III.

Defendant denies that it is indebted to plaintiff in the sum of \$2,500 or in any other sum or at all, either as

alleged in plaintiff's second and separate cause of action or otherwise.

Answer to Third Cause of Action

I.

Defendant hereby repeats paragraphs I and II of its answer to the first cause of action and incorporates the same herein as if set out in full.

II.

Defendant denies each and all of the allegations contained in paragraph II of said third cause of action.

III.

Defendant has not sufficient information or belief upon the subject to enable it to answer the allegations contained in lines 25 to 32 inclusive on page 11 and the first four words in line 1 on page 12 of said complaint, and therefore, and placing its denial upon that ground, denies each and all of the allegations contained therein. Defendant denies each and all of the remaining allegations contained in paragraph III of said third cause of action, to wit, the allegations contained in lines 1 to 11 inclusive on page 12 of said complaint.

IV.

Referring to paragraph IV of said third cause of action defendant admits that it asserts that there have been no breaches of said contract committed by it and that plaintiff neither had nor has any right to terminate said contract. [31]

Answer to Fourth Cause of Action

I.

Defendant hereby repeats paragraphs I to X inclusive of its answer to the first cause of action and paragraphs II, III and IV of its answer to the third cause of action, and incorporates the same herein as if set out in full.

II.

Referring to paragraph II of said fourth cause of action defendant admits that prior to April 10, 1943, it advised plaintiff that it desired to utilize his services to portray the role of Hank in a photoplay then entitled "Fired Wife"; that defendant expected to make said photoplay as a Class A picture; that the script deserved a fine cast and a good director and that the studio would try to secure the same; that an attempt had been made to secure the services of Teresa Wright, Charles Coburn and Eddie Rochester Anderson, but that defendant was unable to obtain their services. Defendant further admits that Leo McCarey has been for many years and is now recognized as one of the outstanding directors in the motion picture industry, and that Teresa Wright, Charles Coburn and Eddie Rochester Anderson are outstanding performers in the motion picture industry. Defendant further admits and alleges that the principal photography on said photoplay commenced on April 15, 1943 and was completed on May 19, 1943; that Leo McCarey did not direct said photoplay and that neither Teresa Wright, Charles Coburn nor Eddie Rochester Anderson portrayed or played any role in said photoplay. Except for

the foregoing express admissions defendant denies each and all of the allegations contained in paragraph II of said fourth cause of action.

III.

Referring to paragraph III of said fourth cause of [32] action defendant admits and alleges that since May 18, 1943 several written notices have been transmitted from defendant to plaintiff in the form of the letter attached hereto and marked Exhibit A, and under date of September 7, 1943 a letter was transmitted by defendant to plaintiff, a copy of which is attached hereto and marked Exhibit B. Defendant admits that plaintiff has been at all times able to render his services to defendant in accordance with the terms of said contract as amended. Except for the foregoing express admissions defendant denies each and all of the allegations contained in paragraph III of said fourth cause of action.

IV.

Referring to paragraph IV of said fourth cause of action defendant denies that an actual or any controversy exists between plaintiff and defendant by reason of any of the matters or things alleged in said fourth cause of action. In so far as the averments in said paragraph IV are intended to be allegations of fact as distinguished from assertions as to the position taken by plaintiff in connection with the controversy which plaintiff claims to exist between him and defendant, defendant denies each and all of such allegations. Defendant admits that plaintiff asserts his position to be as set forth in said paragraph IV, but denies that any of such assertions is well taken.

Wherefore, defendant prays that the court make an order declaring said contract of November 18, 1938, as amended, to be in full force and effect and that defendant's acts and conduct in connection therewith, as set forth in the complaint, were and are proper and justified by plaintiff's acts and conduct in the premises, for defendant's costs incurred herein and for such other relief as to the court shall seem meet.

LOEB AND LOEB

By Milton H. Schwartz

Attorneys for Defendant [33]

EXHIBIT A

(UNIVERSAL PICTURES COMPANY, INC.)

Letterhead

Registered Mail

Mr. Robert Cummings

c/o Mr. Oscar Cummings

8511 Sunset Boulevard

Los Angeles, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks and two (2) days commencing June 25, 1943. This is to notify you that we have elected to and do hereby exercise

the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Assistant Secretary

Edward Muhl

jab/j [34]

EXHIBIT B

(UNIVERSAL PICTURES COMPANY, INC.)

Letterhead

September 7, 1943

Registered Mail

Mr. Robert Cummings
c/o Mr. Oscar Cummins
8511 Sunset Boulevard
Los Angeles, California

Dear Mr. Cummings:

This will acknowledge receipt of your telegram of September 1, 1943.

Despite all statements and notices by you to the contrary, we will continue to treat and consider your contract of employment with us dated November 21, 1938, as amended, as being in full force and effect.

Under its terms you are precluded from rendering services for anyone else without our prior consent. The consent given to you in connection with the "Stars Over Hollywood" radio program was made without prejudice to or waiver of our rights. All rights and remedies which we may have in the premises are expressly reserved.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Assistant Secretary

Edward Muhl

jab/j [35]

[Verified.]

[Endorsed]: Filed Oct. 6, 1943, 3:14 p. m. J. F. Moroney, County Clerk; by M. Enfield, Deputy.

[Endorsed]: Filed Oct. 20, 1943. [36]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL TO FEDERAL COURT

The verified petition of Universal Pictures Company, Inc., a corporation, respectfully shows:

I.

At the commencement of the within action and at all times material herein, defendant Universal Pictures Company, Inc. was and it now is a corporation duly organized and existing under and by virtue of the laws of the state of Delaware and duly authorized to transact and transacting business in the state of California. By reason of the foregoing facts said defendant at all times material herein has been and now is a citizen of the state of Delaware.

II.

Defendant Universal Pictures Company, Inc. is informed and believes, and therefore alleges, that at the commencement of the within action and at all times material herein, plaintiff was and now is a citizen of the state of California residing within the Southern District of California, Central Division.

III.

The within cause is one and presents a controversy wholly between citizens of different states, to wit: between plaintiff, a citizen of California, and defendant Universal Pictures Company, Inc., a citizen of Delaware.

IV.

The matter in controversy herein, exclusive of interest and costs, exceeds in value the sum of \$3,000, said matter being the right of plaintiff to recover the sum of

\$10,250, claimed to be due plaintiff from defendant as salary.

V.

The within cause is one of which the United States District Court is given original jurisdiction in that it is a cause wholly between citizens of different states in which the matter in controversy exceeds in value the sum of \$3,000.

Wherefore, defendant Universal Pictures Company, Inc., respectfully prays that the within cause be transferred and removed to the United States District Court for the Southern District of California, Central Division, and that all further proceedings herein be stayed.

Dated: September 28, 1943,

LOEB AND LOEB

By Milton H. Schwartz

Attorneys for Defendant Universal Pictures
Company, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

28 U. S. C. A., section 71, 72;

Parkinson v. Barr, 105 Fed. 81;

Loot v. Winters' Estate, 115 Fed. 362.

[Verified.]

Received copy of the within Petition this 6th day of October, 1943. Roth & Branner & Joseph J. Cummins. Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 6, 1943, 3:14 p. m. J. F. Moroney, County Clerk; by M. Enfield, Deputy.

[Endorsed]: Filed Oct. 20, 1943.

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL TO FEDERAL COURT
AND STAY OF PROCEEDINGS

This matter having come on regularly to be heard in Department 35 of the above-entitled court, upon the petition of defendant Universal Pictures Company, Inc., and it appearing that the within cause is wholly between citizens of different states, that the matter in controversy exceeds in value the sum of \$3,000.00 and that the action is one of which the United States District Court is given jurisdiction, and that defendant Universal Pictures Company, Inc. has duly petitioned for removal thereof to the United States District Court for the Southern District of California, Central Division, and has filed a good and sufficient bond in connection therewith.

Now, Therefore, It Is Ordered that the within action be, and it hereby is, transferred and removed to the United States District Court for the Southern District of California, Central Division. [37]

It Is Further Ordered that all proceedings herein in the within court be, and they hereby are, stayed.

Dated: October 13, 1943.

ALFRED L. BARTLETT

Judge

[Endorsed]: Filed Oct. 13, 1943. J. F. Moroney,
County Clerk; by J. D. John, Deputy.

[Endorsed]: Filed Oct. 20, 1943. [38]

In the District Court of the United States
Southern District of California
Central Division
No. 3242-H

ROBERT CUMMINGS, Plaintiff,
vs.

UNIVERSAL PICTURES COMPANY, INC.,
a corporation, Defendant.

UNIVERSAL PICTURES COMPANY, INC.,
a corporation, Cross-complainant,
vs.

ROBERT CUMMINGS, Cross-defendant.

ORDER TO SHOW CAUSE

Upon reading and filing the verified counterclaim of defendant and cross-complainant, Universal Pictures Company, Inc., herein, and good cause appearing therefor,

It Is Hereby Ordered that cross-defendant, Robert Cummings, be, and appear before this court before the Honorable H. A. Hollzer, District Judge thereof, in the Post Office and Court House, Los Angeles, California, at the hour of 10:00 o'clock A. M., on Monday, October 25, 1943, then and there [40] to show cause, if any he has, why an injunction pendente lite should not be issued enjoining him from rendering or offering to render, or agreeing to render his services to any person, firm or corporation other than cross-complainant, Universal Pictures Company, Inc., and particularly from rendering his services in connection with the broadcast of the "Lux Theater of the Air" program scheduled for October 25, 1943, or on any other date or for any other radio program.

Dated: October 20th, 1943.

Paul J. McCormick
Judge

[Endorsed]: Filed Oct. 20, 1943. [41]

[Title of District Court and Cause.]

COUNTERCLAIM

Universal Pictures Company, Inc., defendant and cross-complainant, complains of Robert Cummings, plaintiff and cross-defendant by way of counterclaim or cross-complaint as follows:

I.

Cross-complainant is, and at all times hereinafter mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and engaged in the business of producing motion pictures, with its studio in the County of Los Angeles, State of California. [44]

II.

Cross-defendant is, and at all times herein mentioned has been, an actor performing on the screen and upon radio programs.

III.

On or about November 21, 1938, cross-complainant and cross-defendant entered into an agreement in writing under and by virtue of the terms of which cross-complainant engaged and employed cross-defendant to render, and said cross-defendant agreed to render, his exclusive services as an actor in such roles and in such photoplays or other productions as cross-complainant might designate. The period for the performance of services by cross-defendant for cross-complainant has not yet elapsed, and under said contract cross-defendant is, and will remain obligated to cross-complainant to perform services thereunder. A copy of said contract is attached to the original complaint on file herein and is hereby referred to and incorporated by reference.

IV.

Cross-defendant agreed under the terms of said written agreement that during the term thereof he would not render his services as an actor or pose, act or appear in photoplays, or in any way connected with radio or other productions, shows or performances for any person, firm or corporation other than cross-complainant without the written consent of cross-complainant first had and obtained. Cross-defendant further agreed that he would not consent to, nor permit any other person to advertise, announce or make known, directly or indirectly, by paid advertisements, press notices or otherwise that he had contracted to do or perform any act or services contrary to the terms of said written agreement. Said written agreement further provided, and provides, that cross-defendant shall at no time during the term of said agreement grant the right to, authorize or willingly permit [45] any person, firm or corporation other than cross-complainant to make use of his name or any reproduction of his physical likeness or of his voice.

V.

The starting salary of cross-defendant under said contract was the sum of \$600.00 per week, and said contract provided for increases in the rate of compensation upon the exercise of various options therein contained. Said options have been duly and regularly exercised by cross-complainant, and the present salary of cross-defendant is the sum of \$1,500.00 per week. At the time of the execution of the contract aforesaid, the fair and reasonable value of cross-defendant's exclusive services as a motion picture actor did not exceed the amount agreed upon in said contract to be paid for such

services, and said contract was, and is fair, just and equitable to each of the parties thereto. At all times since the inception of said contract the minimum compensation for cross-defendant's services to cross-complainant has been, and now is at the rate of more than \$6,000.00 per annum.

VI.

Cross-complainant has duly performed all of the terms, conditions and promises required on its part to be performed under said written agreement.

VII.

On or about April 12, 1943, cross-defendant failed and refused, and ever since said time has failed and refused and still fails and refuses, to perform or render his exclusive or any services as a motion picture actor in motion pictures to be produced by cross-complainant.

VIII.

On or about October 18, 1943, cross-defendant threatened, and still threatens to, and intends to, and unless restrained by this Court will, further violate the terms and [46] provisions of said written agreement by rendering, and agreeing to render, his services as an actor in the "Lux Theater of the Air" in a radio broadcast to be held on Monday, October 25, 1943. Cross-complainant further alleges that in the radio broadcast on October 18, 1943, of the "Lux Theater of the Air," the announcer on said program announced over the air that on Monday, October 25, 1943, cross-defendant would appear on said "Lux Theater of the Air" program in a play entitled "Slightly Dangerous." Cross-complainant is

informed and believes, and upon such information and belief further alleges, that cross-defendant intends to, and unless restrained by this Honorable Court, will agree to render and render services in other radio broadcasts and for persons, firms or corporations other than cross-complainant.

IX.

Cross-complainant has not given its permission, either written or otherwise, to cross-defendant to appear in said, or any radio program, as required by said written agreement as hereinabove alleged, or to perform services for any person, firm or corporation, and such appearance, if made, and the performance of services for any person, firm or corporation other than cross-complainant, will be a further breach of said written agreement and of the provisions thereof referred to hereinabove. In this connection cross-complainant alleges that under and by virtue of the provisions of said written agreement, cross-defendant agreed that cross-complainant might have injunctive and other equitable relief to prevent any breach of said agreement by cross-defendant.

X.

The services of cross-defendant as an actor are special, unique, extraordinary and artistic in character, and cross-defendant has become popular with the motion picture and radio public. [47]

XI.

The violation of said written agreement by cross-defendant in the manner hereinabove alleged will, unless

restrained by this Honorable Court, irreparably injure cross-complainant in that cross-complainant will be deprived of the special, unique, extraordinary and artistic services of cross-defendant and said services will become available to, and be availed of by, cross-complainant's competitors and other persons, firms and corporations, and further in that cross-complainant will be deprived of the opportunity of producing motion pictures in which cross-defendant appears and thereby will be deprived of the profits and gains which can or may be realized therefrom. The amount of profits and gains that will so be lost cannot be ascertained or estimated for the reason that the monetary returns on and from motion pictures vary with each individual picture and cannot be known in advance. Cross-complainant's remedy at law will be, and is, inadequate in that its damages cannot, and could not be adequately or entirely ascertained, as hereinabove alleged, and further in that, as cross-complainant is informed and believes and therefore alleges, cross-defendant is not, and would not be, able to respond to any judgment for the amount of ascertainable damages which would be suffered by cross-complainant.

XII.

Cross-complainant is, and at all times has been, ready, able and willing to perform its obligations under said contract, and hereby offers to continue to perform all of its obligations under said contract upon the resumption and continuance by cross-defendant of the performance of his obligations thereunder.

Wherefore, cross-complainant prays:

1. That an order to show cause issue; and that upon the hearing thereof an injunction pendente lite be made and [48] entered herein restraining and enjoining cross-defendant from rendering or offering to render, or agreeing to render his services to any person, firm or corporation other than cross-complainant, Universal Pictures Company, Inc., and particularly from rendering his services in connection with the broadcast of the "Lux Theater of the Air" program scheduled for October 25, 1943, or on any other date or for any other radio program;

2. That upon a trial hereof a permanent injunction be made and entered herein restraining and enjoining cross-defendant from rendering, offering to render or agreeing to render his services to any person, firm or corporation other than cross-complainant, until such time as he shall have complied with his obligations to cross-complainant and shall no longer be obligated to perform services for cross-complainant, and

3. For costs, and for such other and further relief as to the Court may seem proper or equitable.

LOEB AND LOEB

By NORMAN NEWMARK

Norman Newmark

Attorneys for Universal Pictures Company, Inc.,
defendant and cross-complainant [49]

[Verified.]

[Endorsed] : Filed Oct. 20, 1943. [50]

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT SPEERS

State of California

County of Los Angeles—ss.

I, Robert Speers, being duly sworn, depose and say:

That I am a resident of the County of Los Angeles, State of California, and that I am and was at all times mentioned herein employed by Universal Pictures Company, Inc., a Delaware corporation, the defendant and cross-complainant in the above entitled matter (which will hereinafter be [51] referred to as Universal) in the capacity of a casting director, and that I render my services for Universal at Universal City, California. My duties among other things as casting director are to notify and to assign actors for roles to be portrayed by them in photoplays scheduled to be produced by Universal. On or about the 25th day of March, 1943, I notified Robert Cummings, the plaintiff and cross-defendant in the above entitled action (who will hereinafter be referred to as Cummings), that Universal desired him to portray the role of "Hank" in the photoplay entitled "Fired Wife." On April 10, 1943, at Universal City, California, in a conversation with Cummings in my office, Cummings told me that he was considering refusing to render his services in said photoplay for the principal reason that the director selected for said photoplay did not meet with his approval and also because he was thinking of signing up with the "Service" for the duration of the war. I told Cummings that such refusal on his part at such a late date would not be fair to Universal, as he was cognizant of the fact that photography of the photoplay referred to herein was scheduled to start on April 12, 1943, and that if his

objections to the selected director were so serious as to have resulted in his refusal and determination not to render his services in said role, he should have so advised me at a much earlier date. Cummings then told me that he understood the position in which Universal would be placed by his refusal to accept the role assigned to him, but that he could not make up his mind definitely whether to render the said services but would let me know. On April 12, 1943, I had a telephone conversation with Cummings relative [52] to the same subject matter as is hereinabove set forth, and Cummings stated to me that he had decided not to render the services requested of him by Universal and would not appear at the studios of Universal to portray the said role herein referred to. Cummings did refuse to report and did not appear to render the said services for the role assigned him, and it therefore became necessary to assign another actor to replace Cummings and this was done. Cummings has failed and refused, and continues to fail and refuse, to report for work at the studios of Universal.

Robert Speers
Robert Speers

Subscribed and sworn to before me this 21st day of October, 1943.

(Seal)

John S. Lawton

Notary Public in and for the County of Los Angeles,
State of California

My commission expires June 29, 1945.

[Endorsed]: Filed Oct. 22, 1943. [53]

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM

Cross-defendant Robert Cummings answers the counterclaim herein as follows:

I.

Admits the allegations of Paragraphs I and II of said counterclaim.

II.

Referring to Paragraph III of said counterclaim, cross-defendant admits that an agreement in writing was entered into between cross-defendant and cross-complainant on November 21, 1938; a copy of said contract is attached to the original complaint [55] on file herein.

In all other respects cross-defendant denies generally and specifically all the matters and things set forth and alleged in Paragraph III.

III.

Referring to Paragraph IV of the counterclaim, cross-defendant admits he executed the written agreement dated November 21, 1938, with cross-complainant, a copy of which is attached to the original complaint on file herein. Said written contract is hereby referred to and incorporated by reference. Cross-defendant admits that he agreed to the terms of said written agreement attached to the original complaint on file herein.

In all other respects cross-defendant denies generally and specifically all the matters and things set forth and alleged in Paragraph IV.

IV.

Referring to Paragraph V of the counterclaim, cross-defendant admits that the written contract referred to as "Exhibit A" provided for a starting salary of \$600.00 per week and for increases in the rate of compensation upon the exercise of various options therein provided, and further that options provided for in said contract were prior to April 12, 1943 duly and regularly exercised, and that the compensation of cross-defendant prior to April 12, 1943, was at the rate of \$1500.00 per week. It is further admitted that at all times since the execution of said written contract, referred to as "Exhibit A," the minimum compensation provided to be paid for cross-defendant's services was at all times prior to April 12, 1943, in excess of \$6000.00 per annum.

In all other respects cross-defendant denies generally and specifically all the matters and things set forth and alleged [56] in said Paragraph V.

V.

Referring to Paragraph VI of the counterclaim, cross-defendant denies generally and specifically all the matters and things therein set forth and alleged.

VI.

Referring to Paragraph VII of the counterclaim, cross-defendant admits that he has not performed any services as a motion picture actor in motion pictures for cross-complainant since April 12, 1943, but in all other respects denies generally and specifically all the matters and things alleged in Paragraph VII. In this connection cross-defendant refers to his complaint on file herein and hereby incorporates by reference said complaint and each of its causes of action as a further answer to said Paragraph VII.

VII.

Referring to Paragraph VIII of said counterclaim, cross-defendant admits that he made arrangements to render his services as an actor in the "Lux Theater of the Air" in a radio broadcast to be held on Monday, October 25, 1943, and that he intends to and will render such services in said program on said date unless restrained by the court from so doing. Cross-defendant has no information or belief as to any announcements made in a radio broadcast on October 18, 1943, of the "Lux Theater of the Air," or at any other time, or through any other program, of the fact that he would appear on said "Lux Theater of the Air" in a play entitled "Slightly Dangerous." For lack of such information or belief, cross-defendant denies generally and specifically said allegations, except as herein admitted. Cross-defendant denies generally and specifically all other matters and things set forth and alleged in said Paragraph VIII. [57]

VIII.

Referring to Paragraph IX of said counterclaim, cross-defendant admits that he has not requested permission from cross-complainant to appear on the "Lux Theater of the Air" a radio broadcast to be held on October 25, 1943, and that cross-complainant has not given him any such permission. It is further admitted that the written agreement referred to as "Exhibit A" provides that cross-complainant might have injunctive and other equitable relief to prevent certain breaches of said written agreement by cross-defendant. Cross-defendant alleges that said written agreement referred to as "Exhibit A" is no longer in force and effect and hereby refers to the original complaint on file herein, and each of its causes of action, and by said reference makes said original complaint a part of his answer to said Paragraph IX.

In all other respects cross-defendant denies generally and specifically all the matters and things set forth and alleged in Paragraph IX.

IX.

Referring to Paragraph X of said counterclaim, cross-defendant admits that he has become popular with the motion picture and radio public and that his services are artistic in character, but denies that said services are especially unique or extraordinary in the legal significance of said words as they pertain or are pertinent to the enforcement of negative covenants or the right to alleged injunctive relief as provided for in Section 526 of the Code of Civil Procedure and Section 3423 of the Civil Code of the State of California.

X.

Referring to Paragraph XI of said counterclaim, cross-defendant alleges that there is no written agreement between cross-defendant and cross-complainant in existence and that [58] there has been no such written agreement since May 29, 1943. Cross-defendant refers to his complaint on file herein and each of its causes of action, and by such reference specifically makes the complaint and each of its causes of action a part of his answer to said Paragraph XI. Cross-defendant denies generally and specifically all matters and things set forth and alleged in Paragraph XI.

XI.

Referring to Paragraph XII of said counterclaim, cross-defendant denies generally and specifically all matters and things therein set forth and alleged.

Wherefore, cross-defendant prays that the order to show cause heretofore issued be dismissed, and that cross-complainant take nothing by its counterclaim or otherwise; that cross-defendant have its costs incurred herein, and such other and further relief as to the Court may seem proper and equitable.

ROTH AND BRANNEN, and
J. J. CUMMINS

By LESTER WM. ROTH
Attorneys for Robert Cummings [59]

[Verified.]

Received copy of the within document. Rec'd Oct. 29, 1943. Loeb and Loeb, By E. Evans.

Invalid unless countersigned.

[Endorsed]: Filed Oct. 30, 1943. [60]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

To the Defendant above-named, and to Messrs. Loeb and Loeb, its attorneys:

You, and Each of You, Will Please Take Notice, that on the 5th day of November, 1943, at the hour of ten (10) o'clock A. M. of said day, or as soon thereafter as counsel may be heard, before the Honorable Harry A. Hollzer, Judge thereof, in Courtroom No. 2 of said Court, the plaintiff above-named will, under the provisions of Rule 56 of the Federal Rules of Civil Procedure, move

the court for an order directing that summary judgment be entered herein on the first count or cause of action [61] in favor of plaintiff and against the defendant.

Said motion will be made upon the ground that as to the claims set forth in said first count or cause of action there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment upon said count or cause of action as a matter of law. Said motion will be made and based upon plaintiff's complaint filed herein, defendant's answer thereto, upon the affidavit of Robert Cummings, filed or to be filed herein, upon the affidavit of Oscar R. Cummins, filed or to be filed herein, and such other affidavits as may be filed herein prior to the hearing, and points and authorities served and filed herewith, and upon all of the records and files in said action, and the minutes of the Court.

Dated: October 29th, 1943.

ROTH AND BRANNEN, and
J. J. CUMMINS

By Lester Wm. Roth

Attorneys for Plaintiff

Office and Postoffice address—

621 S. Hope Street, Suite 1220

Los Angeles 14, California

Telephone—TRinity 1851

[Endorsed]: Filed Oct. 30, 1943. [62]

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT CUMMINGS
RE PRELIMINARY INJUNCTION.

Robert Cummings, being duly sworn, deposes and says: I am plaintiff and cross-defendant in the above entitled action.

Reference is hereby made to the complaint on file herein and the answer of defendant, Universal Pictures Company, Inc., hereinafter referred to as "Universal," and both said complaint and said answer are by such reference made a part hereof. [66]

In addition to the written communications between myself and Universal which are set forth in the complaint on file herein and the answer in reply thereto, the only other written communications which have been exchanged between myself and Universal are Exhibits A to L, both inclusive, attached hereto and by reference made a part hereof.

There have been no other written communications of any kind exchanged between Universal and myself except those referred to in the foregoing paragraphs and there have been no communications, oral or otherwise, between Universal and myself in respect to the rendition of my services or the status of the alleged contract dated November 21, 1938, except those written communications which are attached hereto as exhibits and which are made a part of my original complaint or attached to Universal's answer to my said complaint.

It is true that I have made a commitment to perform on "Lux Theater of the Air," in a radio program entitled "Slightly Dangerous" on October 25, 1943. I have on many previous occasions performed on radio programs with and without the consent and permission of

Universal. Universal has never at any time in respect of said radio programs complained of my performance thereon or made the claim that by rendering my services in connection with said radio programs, or any of them, I have in any way interfered with their alleged contractual rights or in any way impaired their right to my services as a motion picture actor in motion pictures, or in any way depreciated the value of my services to them, which Universal asserts to be "special, unique, extraordinary and artistic."

From November 21, 1938, to May 29, 1943, I never rendered my services as a motion picture actor in motion pictures to anyone other than Universal, without the express permission and consent and pursuant to the direction and request of Universal. I did [67] prior to May 29, 1943, render my services as a motion picture actor in motion pictures to persons other than Universal with the consent and at the express direction of Universal.

Since May 29, 1943, I have not rendered my services as a motion picture actor in motion pictures to any person and I have made no commitment to any person to render my services as a motion picture actor in motion pictures to any person and I have no such commitments now.

It is not true as set forth and alleged in the counterclaim of Universal, and specifically in paragraph XI of said counterclaim, that if I render my services to the "Lux Theater of the Air" in the play entitled "Slightly Dangerous" on October 25, 1943, that Universal will be irreparably or otherwise damaged. My commitment to appear in said program is for a single night and calls for my services as a radio performer. Said services would in no way depreciate or lessen the value of my services as a motion picture actor in motion pictures to Universal,

or any other person, even assuming that Universal has a valid subsisting contract between itself and myself at the present time requiring me to render my services as a motion picture actor or otherwise to Universal. It is not true that I am financially irresponsible or unable to respond in an action at law for such damages as might be suffered by Universal, but on the contrary, if the position of Universal is true that a valid subsisting contract exists between myself and Universal, the means of satisfying any damages that might be suffered by Universal are in the control of Universal and could by Universal be applied to the satisfaction of any claim for damages that it might have against me by reason of my alleged breach of my alleged contract with Universal. The damages, if any, which may be suffered by Universal by reason of my appearance in "Slightly Dangerous," even assuming a valid existing contract [68] between myself and Universal, are inconsequential and easily ascertainable.

It is clear from the facts alleged in the complaint and in the counterclaim of Universal that Universal has a plain, clear, speedy and adequate remedy at law.

The fact is that between April 10, 1943, and May 29, 1943, Universal never at any time, as is required by the contract dated November 21, 1938, requested me to perform or render any services to it other than its request that I render services in the play "Fired Wife" as is more particularly alleged in my complaint. Universal has paid me no compensation under said alleged contract, has placed me on continuous suspension, and takes the position contrary to the express terms of the alleged contract upon which Universal relies, that Universal does not have to use my services or request me to perform my services and that Universal may, in the absence of my prayerful re-

quest that it use my services, place me upon suspension indefinitely and thus prevent me from working for them and from earning a livelihood by working for others.

I have read the affidavit of Robert Speers filed herein and I deny generally and specifically all the matters and things set forth in said affidavit, commencing with the word "On" in line 12, page 2, to and including the word "know" in line 31, near the bottom of page 2.

Affiant further denies that he has, as averred by said Speers in his affidavit, failed and refused or that he continues to fail and refuse to report for work at the studio of Universal.

In respect to the matters and things averred by said Speers in his said affidavit, affiant specifically refers to the allegations made in the complaint of affiant herein and in each and every cause of action of said complaint, and makes all of said matters and things alleged in said complaint a part hereof [69] by such reference. Affiant further avers that there is nothing in the contract dated November 21, 1938, upon which Universal relies which requires affiant to report for work at the studio of Universal or any place else, except pursuant to the request and direction of Universal and in this connection affiant specifically avers that Universal has never made any request, demand or suggestion in accordance with the terms of said contract dated November 21, 1938, or otherwise, that affiant report to Universal at its studio or any place else, for work or for the rendition of his services.

Robert Cummings

Subscribed and sworn to before me this 23rd day of October, 1943.

(Seal)

Leo K. Gold

Notary Public in and for said County and State. [70]

EXHIBIT A

WESTERN UNION TELEGRAM

June 3, 1943

UNIVERSAL PICTURES COMPANY, INC.
UNIVERSAL CITY
CALIFORNIA

THIS WILL ACKNOWLEDGE RECEIPT OF YOUR WIRE OF JUNE 2, 1943. MY POSITION AS YOU WERE HERETOFORE NOTIFIED BY ME HAS NOT BEEN CHANGED AND I DENY EACH AND ALL OF THE STATEMENTS CONTAINED IN YOUR WIRE OF JUNE 2, 1943, WHICH ARE INCONSISTENT WITH THE POSITION HERETOFORE EXPRESSED BY ME.

ROBERT CUMMINGS [71]

EXHIBIT B

UNIVERSAL PICTURES COMPANY, INC.

Universal City California

June 24, 1943

Registered Mail

Mr. Robert Cummings

c/o Mr. Oscar Cummins

8511 Sunset Boulevard

Los Angeles, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks and two (2) days commencing May 19, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Assistant Secretary

Edward Muhl

jab/j [72]

EXHIBIT C

POSTAL TELEGRAPH

June 25, 1943

Universal Pictures Company, Inc.

Universal City, California

THIS WILL ACKNOWLEDGE YOUR LETTER OF JUNE 24, 1943, AS I HAVE ALREADY NOTIFIED YOU THE CONTRACT OF EMPLOYMENT DATED NOVEMBER 21, 1938 HAS BEEN TERMINATED BY REASON OF YOUR MATERIAL BREACH THEREOF. ANY STATEMENT CONTAINED IN YOUR LETTER OF JUNE 24, 1943 INCONSISTENT WITH THIS FACT IS HEREBY DENIED. THIS WIRE IS SENT YOU WITHOUT PREJUDICE TO OR WAIVER OF ANY OTHER RIGHTS AND/OR REMEDIES WHICH I MAY HAVE IN THE PREMISES, ALL SUCH OTHER RIGHTS AND/OR REMEDIES BEING EXPRESSLY RESERVED BY ME.

ROBERT CUMMINGS

CHARGE TO CRESTVIEW 18119 [73]

EXHIBIT D

UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

July 31, 1943

Registered Mail

Mr. Robert Cummings

c/o Mr. Oscar Cummins

8511 Sunset Boulevard

Los Angeles, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks and two (2) days commencing June 25, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Assistant Secretary

Edward Muhl

jab/j [74]

EXHIBIT E

POSTAL TELEGRAPH

August 2, 1943

Universal Pictures Company, Inc.

Universal City, California

THIS WILL ACKNOWLEDGE YOUR LETTER OF JULY 31, 1943, AS I HAVE ALREADY NOTIFIED YOU THE CONTRACT OF EMPLOYMENT DATED NOVEMBER 21, 1938, HAS BEEN TERMINATED BY REASON OF YOUR MATERIAL BREACH THEREOF. ANY STATEMENT CONTAINED IN YOUR LETTER OF JULY 31, 1943, INCONSISTENT WITH THIS FACT IS HEREBY DENIED. THIS WIRE IS SENT YOU WITHOUT PREJUDICE TO OR WAIVER OF ANY OTHER RIGHTS AND/OR REMEDIES WHICH I MAY HAVE IN THE PREMISES, ALL SUCH OTHER RIGHTS AND/OR REMEDIES BEING EXPRESSLY RESERVED BY ME.

ROBERT CUMMINGS

CHARGE TO CRESTVIEW 18119 [75]

EXHIBIT F

UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

August 28, 1943

Mr. Robert Cummings,
c/o Mr. Oscar Cummins,
9441 Wilshire Boulevard,
Beverly Hills, California.

Dear Mr. Cummings:

Enclosed please find copy of notice directed to the persons named therein, which is self-explanatory.

The fact that we have consented to your appearance on this program is not, nor shall the same be considered, a waiver of our right to your exclusive services, nor shall our consent be deemed to be a consent to the rendition of your services for any other person, firm or corporation on any other or different occasion.

This notice is served upon you without prejudice or waiver of any other rights and/or remedies which we may have, and all such other rights and/or remedies are expressly reserved by us and without prejudice or waiver of any other rights and/or remedies set up in any previous notice given you.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Registered

Special Delivery [76]

EXHIBIT G

POSTAL TELEGRAPH

September 1, 1943

UNIVERSAL PICTURES COMPANY, INC.
UNIVERSAL CITY,
CALIFORNIA

I ACKNOWLEDGE RECEIPT OF YOUR LETTER DATED AUGUST 28, 1943. MY APPEARANCE ON A RADIO PROGRAM IN QUESTION WAS MADE PURSUANT TO AN AGREEMENT BETWEEN MYSELF AND DARI-RICH, "STARS OVER HOLLYWOOD" PROGRAM. I DID NOT SEEK PERMISSION FROM YOU NOR DO I CONSIDER THAT I WAS OBLIGATED TO ASK PERMISSION FROM YOU. MY POSITION AS HERETOFORE GIVEN YOU THAT I AM UNDER NO CONTRACTUAL OR OTHER OBLIGATION TO YOU HAS NOT CHANGED. PLEASE BE FURTHER ADVISED THAT I WILL HOLD YOU STRICTLY ACCOUNTABLE FOR ANY DAMAGES RESULTING FROM YOUR UNAUTHORIZED NOTICE DATED AUGUST 28, 1943, TO CARI-RICH, "STARS OVER HOLLYWOOD" PROGRAM AND FROM ANY OTHER NOTICES, ACTIONS, OR INTERFERENCE TAKEN BY YOU OF A SIMILAR CHARACTER.

ROBERT CUMMINGS [77]

EXHIBIT H

UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

September 7, 1943

Registered Mail

Mr. Robert Cummings

c/o Mr. Oscar Cummins

9441 Wilshire Boulevard

Beverly Hills, California

Dear Mr. Cummings:

This will acknowledge receipt of your telegram of September 1, 1943.

Despite all statements and notices by you to the contrary, we will continue to treat and consider your contract of employment with us dated November 21, 1938, as amended, as being in full force and effect.

Under its terms you are precluded from rendering services for anyone else without our prior consent. The consent given to you in connection with the "Stars Over Hollywood" radio program was made without prejudice to or waiver of our rights. All rights and remedies which we may have in the premises are expressly reserved.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Assistant Secretary

Edward Muhl

jab/j [78]

EXHIBIT I

WESTERN UNION TELEGRAM

September 8, 1943

Universal Pictures Co. Inc.
Universal City,
California

YOUR REGISTERED LETTER OF SEPTEMBER FOURTH TO ROBERT CUMMINGS HAS BEEN RECEIVED BY ROBERT CUMMINGS AND TRANSMITTED TO ME AS HIS ATTORNEY FOR ATTENTION.

YOU ARE ADVISED AS YOU HAVE BEEN HERETOFORE THAT BY REASON OF YOUR MATERIAL BREACHES OF THE CONTRACT REFERRED TO IN YOUR LETTER OF SEPTEMBER FOURTH ROBERT CUMMINGS ON MAY 29, 1943 ELECTED TO AND DID TERMINATE SAID CONTRACT.

MR. CUMMINGS THEREFORE CONSIDERS SAID CONTRACT TO BE AT AN END AND HE HAS BEEN ADVISED THAT IT IS.

LESTER WM. ROTH [79]

EXHIBIT J

September 10, 1943

Universal Pictures Company, Inc.
Universal City,
California

Attention: Mr. Edward Muhl

Gentlemen:

In respect of your letter of the 7th to Robert Cummings, in care of Mr. Oscar Cummins, you are referred to the day letter of the writer addressed and transmitted to you on September 8th, 1943.

Yours very truly,

LESTER WM. ROTH
OF ROTH AND BRANNEN

LWR:DT [80]

EXHIBIT K

UNIVERSAL PICTURES COMPANY, INC.
Universal City, California

October 11, 1943

Registered Mail
Mr. Robert Cummings
c/o Mr. Oscar Cummins
9441 Wilshire Boulevard
Beverly Hills, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal

and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks commencing September 7, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By J. A. Brewster

Assistant Treasurer

jab/j [81]

EXHIBIT L

October 15, 1943

Universal Pictures Company, Inc.,
Universal City,
California

Attention: J. A. Brewster
Asst. Treasurer

Gentlemen:

Your notice of October 11th addressed to Mr. Robert Cummings in care of Mr. Oscar Cummins has been transmitted to me for attention.

Our petition in respect to this notice is set forth in that certain action entitled "Robert Cummings vs. Universal Pictures Company, Inc." in the Superior Court No. 488314.

Yours very truly,

LESTER WM. ROTH
OF ROTH AND BRANNEN

LWR:DT

Received copy of the within document. Rec'd Oct. 29, 1943. Loeb and' Loeb, by E. Evans. Invalid unless countersigned.

[Endorsed]: Filed Oct. 30, 1943. [82]

[Title of District Court and Cause.]

AFFIDAVIT OF OSCAR R. CUMMINS

State of California

County of Los Angeles—ss.

Oscar R. Cummins, being first duly sworn deposes and says:

That he is an attorney at law, duly licensed to practice in all of the courts of the State of California and the District Court of the United States in and for the Southern District of California, Central Division.

That the plaintiff, Robert Cummings, is a client of your affiant and is and has been a client of your affiant at all times herein mentioned.

That affiant represented the plaintiff, Robert Cummings, in various and all negotiations with the defendant, Universal Pictures Company, Inc.

Your affiant avers that on or about the 26th day of May, 1943, at or about the hour of 2:30 P. M., affiant made [83] personal demand upon the defendant at defendant's studio in Universal City, California, for the salary check due plaintiff for the period after May 18, 1943; that your affiant was informed by the cashier at Universal Pictures Company, Inc., at Universal City, California, that there was no salary due and payable to the plaintiff and that the plaintiff was still on suspension.

Your affiant avers that the following morning, viz., May 27, 1943, at or about the hour of 11:00 A. M., affiant

telephoned to the cashier at Universal Pictures Company, Inc. and stated in words and substance as follows: "Is Robert Cummings' check ready?" to which said cashier replied in words and substance, "We have no check for Robert Cummings; we have received no instructions to put him back on the payroll."

Your affiant further avers that one-half hour later, to-wit, at about 11:30 A. M. of May 27, 1943, he requested his secretary, Belle Marco, to telephone to the cashier at Universal Pictures Company, Inc.; that your affiant listened-in on the telephone extension to the said conversation between affiant's secretary and the cashier of Universal Pictures Company, Inc.

Your affiant avers that his secretary inquired in words and substance as follows: "Is Robert Cummings' check ready?" to which the cashier's office at Universal Pictures Company, Inc., Universal City, California, whose telephone number is STanley 71211, replied in words and substance as follows: "There is no check for Bob; he is still on suspension."

Your affiant avers that he is and has been at all times herein mentioned the exclusive representative of the plaintiff in all negotiations and matters with the defendant corporation; that affiant is thoroughly conversant with the contract of November 21, 1938, as well as the various adjustments made thereto from time to time by and between the plaintiff and defendant corporation; that defendant corporation under said contract and [84] amendments was obliged to pay to the plaintiff various agreed

sums of money weekly for forty-two (42) weeks out of the fifty-two (52) week year; that defendant corporation reserved the right to lay off the plaintiff for ten (10) weeks at defendant's option and designation; that the said ten (10) weeks' lay-off periods had been consumed by the defendant corporation for the contractual year of 1942-1943 and hence there was no right to lay off the plaintiff for any further periods during the contractual year 1942-1943.

Further deponent saith not.

OSCAR R. CUMMINS

Oscar R. Cummins

Subscribed and sworn to before me this 30th day of October, 1943.

(Seal)

Leo K. Gold

Notary Public in and for the County of Los Angeles,
State of California.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 2, 1943. [85]

[Title of District Court and Cause.]

AFFIDVAIT OF B. W. STEINBERG
ON APPLICATION FOR INJUNCTION AND
AGAINST MOTION FOR JUDGMENT

State of California

County of Los Angeles—ss.

I, B. W. Steinberg, being first duly sworn, depose and say:

That I am a resident of the County of Los Angeles, State of California, and that I am and at all times mentioned herein was employed by Universal Pictures Company, Inc., a Delaware corporation, the defendant and cross-complainant in the above entitled matter (which will hereinafter be referred [86] to as Universal), as Paymaster; that at no time since April 12, 1943, has Robert Cummings, the plaintiff and cross-defendant herein, or anyone in his behalf, requested or demanded payment of any sums purported to be due him under the terms of his contract with Universal from me or to my best knowledge from any person under my supervision.

B. W. Steinberg

B. W. Steinberg

Subscribed and sworn to before me this 22nd day of October, 1943.

(Seal)

John S. Lawton

Notary Public in and for the County of Los Angeles,
State of California

My commission expires June 29, 1945.

[Endorsed]: Filed Nov. 2, 1943. [87]

[Title of District Court and Cause.]

AFFIDAVIT OF DANIEL J. KELLEY
ON APPLICATION FOR INJUNCTION AND
AGAINST MOTION FOR JUDGMENT

State of California

County of Los Angeles—ss.

I, Daniel J. Kelley, being first duly sworn, depose and say:

I am a resident of the County of Los Angeles, State of California and am employed and at all times mentioned herein have been employed by Universal Pictures Company, Inc., the defendant and cross-complainant in the above entitled matter (which will hereinafter be referred to as Universal), [88] as Production Executive in Charge of Talent, Writers and Directors. At no time since April 12, 1943, has Robert Cummings, the plaintiff and cross-defendant herein (who will hereinafter be referred to as Cummings) reported to the studios of Universal or to anyone connected with Universal for the purpose of rendering his services as an actor. Universal has at all times been and still is ready, willing and able to have Cummings resume his services for it under his employment contract. Before Universal made its employment contract with Cummings in November 1938, Cummings was not recognized as being among the top featured or leading players in motion pictures. During the entire time of its relationship with Cummings Universal has made every effort to assist him to become an important screen personality and to build him up as a top star and featured player. Largely through the efforts of Universal in casting Cummings in important roles in top budgeted pictures and publicizing him and giving him

strong supporting casts. Cummings has now become an important featured player and has established a popularity with the motion picture public. That the foregoing is true will appear from what follows in this affidavit.

We have made eleven pictures at Universal Studios in which Cummings played a role in the period between March 20, 1939, and March 23, 1943. The first of the pictures above referred to was "Three Smart Girls Grow Up" in which Deanna Durbin was the star. Deanna Durbin was then and is now one of the best known and most popular actresses on the screen. Cummings played the leading role opposite Deanna Durbin. The photoplay was produced for Universal by Joe Pasternak and directed by Henry Koster, each of whom is in the top rank of his profession in the motion picture industry. One of the supporting roles was played by Charles Winniger, a popular [89] and well-known character actor. The production cost on the picture was over \$800,000.00.

"The Under Pup," another photoplay produced by Joe Pasternak and directed by Richard Wallace, was a starring vehicle for Cummings and Gloria Jean. Among the important featured players who also appeared in this picture were Beulah Bondi, Virginia Weidler, Margaret Lindsay, C. Aubrey Smith, Billy Gilbert and Samuel S. Hinds. The production cost on this picture was over \$465,000.00.

The next picture for which Cummings rendered services for Universal was entitled "Rio" in which Basil Rathbone and Victor *McLaughlin* starred and in which Cummings was featured opposite Sigrid Gurie. Among the supporting cast were such prominent screen players as Leo Carrillo, Billy Gilbert and Maurice Moscovich. The production cost of this picture was over \$448,000.00.

"Charlie McCarthy, Detective," the next picture in which Cummings played a featured role, included in the cast such well-known personalities as Edgar Bergen, Edgar Kennedy, and Samuel Hinds. The production cost of this picture was over \$363,000.00.

"Private Affairs," the next picture in which Cummings appeared for Universal, was produced by Glen Tryon and directed by Albert S. Rogell. Cummings played the male lead in this picture opposite Nancy Kelley, a well-known screen actress, and the supporting cast in this picture included Roland Young, Hugh Herbert and Montague Love.

Another picture in which Cummings played the leading role was "Spring Parade" in which Deanna Durbin was starred. This picture was also produced by Joe Pasternak and directed by Henry Koster, and the production cost was over \$950,000.00.

Cummings played a prominent role in "A Night in the [90] Tropics," a picture featuring Abbott and Costello. Other prominent and well-known players in the picture were Alan Jones, Nancy Kelley, Leo Carrillo and Mary Boland. The production cost was over half a million dollars.

Cummings played opposite Deanna Durbin again in the picture "It Started With Eve," in which Charles Laughton, Guy Kibbee and Walter Catlett, all prominent, popular screen actors, also appeared. The picture was produced by Joe Pasternak and directed by Henry Koster. The production cost was approximately \$1,250,000.00.

The picture "Saboteur" was a Frank Lloyd production directed by the distinguished English director, Alfred Hitchcock. Priscilla Lane and Cummings played the lead-

ing roles. Production cost of the picture was approximately \$780,000.00.

Cummings played the male leading role opposite Diana Barrymore in the Universal picture "Between Us Girls." The producer-director was Henry Koster. The supporting cast included Kay Francis, John Boles and Andy Divine. The cost of production of this picture was over \$835,000.00.

The latest picture in which Cummings has appeared for Universal and which has just been released is entitled "Flesh and Fantasy." The picture was produced for the defendant company by Charles Boyer and Julien Duvivier, and directed by Duvivier. The company in which Cummings appears as an actor in this picture includes Charles Boyer, Betty Field, Edward G. Robinson, C. Aubrey Smith, Barbara Stanwyck and Charles Wininger.

The foregoing statements as to the nature of the pictures in which Universal cast Cummings at its own studio is especially intended as a refutation of the allegations made in the third cause of action of plaintiff's complaint [91] and particularly in paragraphs 2 and 3 of that cause of action on pages 11 and 12. In essence the allegations are that defendant Universal in bad faith and with malice and for the purpose of discrediting plaintiff and imperiling his future, cast him in minor roles.

Under its contract with Cummings Universal has the right to lend Cummings' services to other motion picture producers and a number of loans in accordance with the contract have been made. In each case, in almost every cast, Cummings was cast in the most important male role in the picture, as will appear from the following: He appeared in "Kings Row" for Warner Bros. in 1941.

Other prominent screen actors in the cast were Ann Sheridan, Ronald Reagan and Betty Field. The director was Sam Wood, one of the most important directors in the motion picture industry. He appeared in "And One Was Beautiful" for Metro-Goldwyn-Mayer in which he received first billing. He played in "Free and Easy" for Metro-Goldwyn-Mayer in 1941 in which he received first male billing. R-K-O gave him first feature billing in the picture "The Devil and Miss Jones" in 1941, which picture starred Miss Jean Arthur, one of the outstanding motion picture actresses. In December 1939, Cummings played in "Everything Happens at Night" for Twentieth Century Fox in which the billing was as follows: Sonja Heinie, Ray Milland, Robert Cummings. In 1941 he played in "Moon Over Miami" for Twentieth Century Fox in which the billing was as follows: Don Ameche, Betty Grable, Robert Cummings. Warner Bros. have just released "Princess O'Rourke" in which Cummings receives first male billing and plays opposite Olivia de Havilland, another very important motion picture personality.

The original term of Universal's contract with Cummings was for six months at a salary of \$600.00 per week [92] for a minimum of twenty weeks. The contract gives Universal seven options on the services of Cummings, four of which had been exercised at the time that Cummings refused to perform any further services for Universal and this law suit resulted. The first exercised option was for an additional six months at \$600.00 per week for a minimum of twenty weeks. The second exercised option was for one year at \$750.00 per week for a minimum of forty weeks. The third exercised option was for one year at \$1,000.00 per week for a minimum of forty weeks, and the fourth exercised option

(which is still in effect) is for one year at \$1,500.00 per week for a minimum of forty weeks. The next option calls for one year at \$2,000.00 per week, the next for one year at \$2,500.00 per week and the next for one year at \$3,000.00 per week.

Universal has paid to Cummings in addition to the salaries paid him under his contract the following bonuses in connection with his services in the following pictures:

“Free and Easy”—1941—\$2,500.00

“The Devil and Miss Jones”—1941—\$2,500.00

“Moon Over Miami”—1941—\$2,500.00

“It Started With Eve”—1941—\$2,500.00

“Kings Row”—1941—\$2,500.00.

“Saboteur”—1942—\$7,500.00

“Between Us Girls”—1942—\$7,500.00

“Princess O’Rourke”—1942—\$7,500.00

“Flesh and Fantasy”—1943—\$7,500.00

Cummings has filed an affidavit which purports to have been sworn to on October 23, 1943, and is filed “Re Preliminary Injunction.” Universal denies each and all of the statements made in the affidavit on page 2, lines 18 to 28 inclusive, and I assert that Cummings has never at any time during the existence of his contract with Universal [93] performed or appeared on a radio program to the knowledge of Universal without the latter’s consent. Universal is entitled to the exclusive services of Cummings, including radio services, under its contract with him and of course the appearance of Cummings on

radio programs without Universal's consent would interfere with and impair the contractual rights of Universal, and if Universal, as Cummings asserts, never made such a claim to him, it was because Universal was ignorant of the fact which now appears for the first time that Cummings violated his contract on a number of occasions by appearing on radio programs without Universal's consent. There need be no reply to the statements made on page 3 of Cummings' affidavit which I have just referred to, lines 9 to 32 inclusive, and lines 1 to 5 inclusive on page 4 for the reason that Cummings did not appear in the Lux Theatre of the Air radio program on October 25, 1943.

Since April 10, 1943, Cummings has not at any time nor has anybody on his behalf made any request, either prayerful or otherwise, to Universal or to anybody acting in its behalf, to use the services of Cummings, but on the contrary Universal has notified Cummings repeatedly, as will appear from the exhibits attached to Cummings affidavit of October 23, 1943, that Cummings would be under suspension during the continuance of his failure, refusal and/or neglect to perform his obligations under the contract. I know of nothing which would have prevented Cummings at any time upon the receipt of such a notice from informing Universal that he was ready to resume the performance of his services under his contract. Instead of so informing Universal, however, he notified Universal by his telegram dated May 29, 1943, a copy of which appears on page 7 of his complaint herein as follows: "That I Elect to and Do Hereby Terminate

Said Contract by Reason of Such Failure [94] and Refusal." That, of course, was a notice to Universal that Cummings did not intend to render any further services for it as a motion picture actor under the employment contract of November 21, 1938.

Daniel J. Kelley

Daniel J. Kelley

Subscribed and sworn to before me this 1st day of November, 1943.

(Seal)

John S. Lawton

Notary Public in and for the County of Los Angeles,
State of California

My commission expires June 29, 1945.

[Endorsed]: Filed Nov. 2, 1943. [95]

[Title of District Court and Cause.]

AFFIDAVIT OF HERMAN D. COOK
ON APPLICATION FOR INJUNCTION AND
AGAINST MOTION FOR JUDGMENT

State of California

County of Los Angeles—ss.

I, Herman D. Cook, being first duly sworn, depose and say:

That I am a resident of the County of Los Angeles, State of California, and that I am and at all times mentioned herein was employed by Universal Pictures Company, Inc., a Delaware corporation, the defendant and cross-complainant in the above entitled matter (which will hereinafter be referred [96] to as Universal), as Assistant Paymaster; that at no time since April 12, 1943, has Robert Cummings, the plaintiff and cross-defendant herein, or anyone in his behalf, requested or demanded payment of any sums purported to be due him under the terms of his contract with Universal.

Herman D. Cook

Herman D. Cook

Subscribed and sworn to before me this 22nd day of
October, 1943.

(Seal)

John S. Lawton

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires June 29, 1945.

[Endorsed]: Filed Nov. 2, 1943. [97]

[Title of District Court and Cause.]

AFFIDAVIT OF H. S. BREWSTER
ON APPLICATION FOR INJUNCTION AND
AGAINST MOTION FOR JUDGMENT

State of California

County of Los Angeles—ss.

I, H. S. Brewster, being first duly sworn, depose and say:

That I am a resident of the County of Los Angeles, State of California, and that I am and at all times mention herein was employed by Universal Pictures Company, Inc., a Delaware corporation, the defendant and cross-complainant in the above entitled matter (which will hereinafter be referred [98] to as Universal), as Assistant Treasurer and Studio Comptroller; that at no time since April 12, 1943, has Robert Cummings, the plaintiff and cross-defendant herein, or anyone in his behalf, requested or demanded payment of any sums purported to be due him under the terms of his contract with Universal from me or to my best knowledge from any person under my supervision.

H. S. Brewster

H. S. Brewster

Subscribed and sworn to before me this 22nd day of October, 1943.

(Seal)

John S. Lawton

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires June 29, 1945.

[Endorsed]: Filed Nov. 2, 1943. [99]

[Title of District Court and Cause.]

AFFIDAVIT OF IVAN BETTS
ON APPLICATION FOR INJUNCTION AND
AGAINST MOTION FOR JUDGMENT

State of California

County of Los Angeles—ss.

I, Ivan Betts, being first duly sworn, depose and say:

That I am a resident of the County of Los Angeles, State of California, and that I am and at all times mentioned herein was employed by Universal Pictures Company, Inc., a Delaware corporation, the defendant and cross-complainant in the above entitled matter (which will hereinafter be referred [100] to as Universal), as Assistant Studio Comptroller; that at no time since April 12, 1943, has Robert Cummings, the plaintiff and cross-defendant herein, or anyone in his behalf, requested or demanded payment of any sums purported to be due him under the terms of his contract with Universal from me or to my best knowledge from any person under my supervision.

Ivan Betts

Ivan Betts

Subscribed and sworn to before me this 22nd day of October, 1943.

(Seal)

John S. Lawton

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires June 29, 1945.

[Endorsed]: Filed Nov. 2, 1943. [101]

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD MUHL

State of California

County of Los Angeles—ss.

I, Edward Muhl, being first duly sworn, depose and say:

That I am the Assistant Secretary of Universal Pictures Company, Inc., the defendant and cross-complainant in the above entitled matter (which will hereinafter be referred to as Universal) and that I am now and at all times herein mentioned have been employed by Universal at their studios [102] located at Universal City, California. Universal has at all times since Cummings' suspension and both prior and subsequent to the receipt of the notice from Cummings by which he purported to terminate his employment contract with Universal (said notice being a telegraphic communication dated May 29, 1943, which is set forth in plaintiff's complaint at page 6, lines 18 to 32 inclusive, and page 7, lines 1 to 25 inclusive), in good faith believed and understood that the plaintiff would not and did not intend to render services for Universal and that at no time was any official of Universal informed by Cummings or by anyone on his behalf that he was desirous of working or wanted his pay check nor did anything come to the attention of Universal which would indicate anything but that Cummings would continue to persist in his refusal to work. If Universal had been advised at any time that Cummings desired or was willing to work and resume his obligations under the employment contract, Universal would have paid him and would not have kept the suspension in force.

Prior to the receipt of the notice sent by Robert Cummings referred to above, I had a telephone conversation with Oscar Cummins, the attorney and personal repre-

sentative of the plaintiff, on March 28, 1943, at or about ten A. M. of said day. I told Oscar Cummins that I had heard a rumor that Metro-Goldwyn-Mayer was interested in Robert Cummings, and I asked him if he knew anything about it. Oscar Cummins stated that he hadn't heard anything about it, but that P-R-C, a producing organization, had called him and asked about Robert Cummings' availability, and he told them that Cummings was engaged in work in connection with the establishment of an air shuttle service and that if anybody wanted him they would have to see General Arnold of the Army Air Corps to get him. He asked me what had disturbed me about it and I replied that I [103] wasn't disturbed, but that I had wanted to know if anybody had suggested to M-G-M that Cummings' suspension had been terminated. Mr. Cummins told me that he was positive that no such thing had occurred.

A letter dated July 6, 1943, written over the signature of 1st Lt. J. W. Gilges, an intelligence officer attached to the Seventh Army Air Force Flying Training Detachment at Oxnard, California, requesting certain information regarding Cummings, was received by Universal. From the contents of this letter we had reason to believe and still believe that Robert Cummings applied for enlistment in some capacity in the Army Air Forces. The Los Angeles Times carried a news item dated July 17, 1943, that Cummings "now is serving as an instructor for the Army Air Force cadets at the Mira Loma Flight Academy Cummings was sworn into the Air Force Reserve this week and had been assigned to his first class of cadets."

Universal has no knowledge that a demand was made for a check for Robert Cummings any time since his suspension. It has been and still is customary that when-

ever a check is not ready for contract employees at the cashier's window, an inquiry is made to the Contract Department, which is under my direct supervision and control, and no such inquiry was made to me, nor to anyone in my department. In the past when any question arose as to the amount due Mr. Cummings, Oscar Cummins invariably contacted me. In this particular instance he did not do so. H. S. Brewster, Ivan Betts, B. W. Steinberg and Herman Cook, whose affidavits are on file herein, are the only persons in charge of the payment of salaries. Universal does not have a "cashier" in the ordinary sense of the word. The person who is often referred to as the "cashier" has no more authority with reference to the payment of salaries than to [104] deliver a check when it is ready. If Robert Cummings or his secretary spoke to the "cashier" as he avers in his affidavit, then it was to a person with no more authority than a clerk whose duty is and was to merely deliver the checks if already drawn. It was never reported to any of these men or to any other official of the studio that any such request for payment had been made. A thorough inquiry has been made in the office through which checks are paid, and we are unable to find anyone who has any knowledge whatever of any alleged demand for a check for Cummings since his suspension.

Edward Muhl (signed)
(Edward Muhl)

Subscribed and sworn to before me this 3rd day of November, 1943.

(Seal) John S. Lawton
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires June 29, 1945.

[Endorsed]: Filed Nov. 4, 1943. [105]

[Title of District Court and Cause.]

SUPPLEMENTARY AFFIDAVIT OF OSCAR R.
CUMMINS IN SUPPORT OF MOTION FOR
JUDGMENT AND AGAINST APPLICATION
FOR INJUNCTION.

State of California
County of Los Angeles—ss.

Oscar R. Cummins, being first duly sworn deposes and
says:

That he has read the affidavits of Daniel J. Kelley,
Ivan Betts, H. S. Brewster, B. W. Steinberg and Herman
D. Cook, filed for and on behalf of the defendant and
cross-complainant, Universal Pictures Company, Inc.

Affiant avers that he has read the affidavit of [106]
B. W. Steinberg who avers that he is the Paymaster
of the defendant corporation, and “that at no time since
April 12, 1943, has Robert Cummings, the plaintiff and
cross-defendant herein, or anyone in his behalf, requested
or demanded payment of any sums purported to be due
him under the terms of his contract with Universal from
me or to my best knowledge from any person under
my supervision.” Affiant avers that the foregoing quoted
and underlined sworn statement of said B. W. Steinberg
is false.

Affiant avers that it was affiant’s custom on Wednes-
days of each week when plaintiff was not on lay-off to
pick up the check of the plaintiff, Robert Cummings, at
the cashier’s window at Universal Studios, the defendant
and cross-complainant’s place of business; that said check

was always present at said cashier's window without the necessity of making "demands" upon any of the executives of the defendant corporation.

Affiant avers that on or about May 26, 1943, affiant called personally at the cashier's window at Universal and that affiant was informed in words and substance that there was no check for Robert Cummings, the plaintiff. Affiant avers that to make sure of the position which the defendant corporation was taking with regard to the plaintiff, affiant personally saw B. W. Steinberg, defendant's Paymaster, and asked said Steinberg for Robert Cummings' check which was due to the plaintiff Cummings for the period after May 18, 1943; that said B. W. Steinberg stated to your affiant at said time and place in words and substance as follows: "I have no check for Bob Cummings; he's still on suspension."

Further deponent saith not.

Oscar R. Cummins

Subscribed and sworn to before me this 2nd day of November, 1943.

(Seal)

Elf Scharlin

Notary Public in and for the County of Los Angeles,
State of California.

[Affidavit of Service by Mail.]

[Endorsed]: Filed No. 4, 1943. [107]

[Title of District Court and Cause.]

AFFIDAVIT OF BELLA MARCO IN SUPPORT
OF MOTION FOR JUDGMENT AND AGAINST
APPLICATION FOR INJUNCTION.

State of California

County of Los Angeles—ss.

Bella Marco, being first duly sworn deposes and says:

That she is employed by Oscar R. Cummins, attorney, with offices in the California Bank Building, 9441 Wilshire Boulevard in the City of Beverly Hills, County of Los Angeles, California. That she has been and is presently secretary to Oscar R. Cummins since May 2, 1942.

That on or about the 27th day of May, 1943, affiant, at [108] the request of said Oscar R. Cummins, telephoned STanley 71211 and asked for the cashier's office. Your affiant avers that at said time and place affiant stated to Mr. Cummins in words and substance as follows: "I have Universal on the line," to which Mr. Cummins replied, "I am listening, Bella," at which affiant recognized that said Oscar R. Cummins was listening-in on the telephone extension.

Your affiant avers that she inquired in words and substance as follows: "Cashier's office, please." Your affiant avers that she was then connected with said cashier's office of Universal Studios and that she then inquired in words and substance as follows: "Is Robert

Cummings' check ready?" to which the gentleman in the cashier's office of defendant Universal replied in words and substance as follows: "There is no check for Bob; he's still on suspension."

Further deponent saith not.

BELLA MARCO

Subscribed and sworn to before me this 3rd day of November, 1943.

(Seal)

LEO K. GOLD

Notary Public in and for the County of Los Angeles,
State of California.

Received copy of the within Affidavit this 4th day of November, 1943. Loeb and Loeb, by E. Evans, Attorneys for Defendant and Cross-Complainant.

[Endorsed]: Filed Nov. 5, 1943. [109]

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES A. SMITH IN SUPPORT
OF MOTION FOR JUDGMENT AND AGAINST
APPLICATION FOR INJUNCTION.

State of California

County of Los Angeles—ss.

James A. Smith, being first duly sworn deposes and says:

That he is a resident of the County of Los Angeles, California, and has been since the year 1939. That on or about the 1st day of September, 1939, he was employed by Robert Cummings in the capacity of man servant, and has ever since then been employed by said Robert Cummings in like capacity. [110]

Affiant avers that on or about the 27th day of May, 1943, Miss Bella Marco, secretary of Mr. Oscar R. Cummins, telephoned your affiant and asked your affiant to go over to Universal Studios to the Paymaster and ask for the check due to Robert Cummings, affiant's employer.

Your affiant avers that it was his custom, from time to time, to pick up the check of his employer, Robert Cummings, at said Universal Studios, when said check was not picked up by Mr. Oscar R. Cummins.

Your affiant avers that he did not go over to Universal Studios, but instead telephoned to the Paymaster of Universal Studios, dialing STanley 71211, and asking for the Paymaster.

. Your affiant avers that the gentleman who answered the telephone stated that he was the Paymaster. Your affiant avers that when your affiant inquired who was speaking, that the voice on the other end of the telephone stated in words and substance as follows: "This is the Paymaster speaking," giving his name, which at this time affiant does not remember.

Affiant avers that he stated in words and substance as follows: "Has Robert Cummings' check been picked up as yet?" to which the person who stated that he was the Paymaster responded in words and substance as follows: "According to our records, he's under suspension."

Further deponent saith not.

JAMES A. SMITH

Subscribed and sworn to before me this 3rd day of November, 1943.

(Seal)

Leo K. Gold

Notary Public in and for the County of Los Angeles.
State of California.

Received copy of the within Affidavit this 4th day of November, 1943. Loeb and Loeb, by E. Evans, Attorneys for Defendant and Cross-Complainant.

[Endorsed]: Filed Nov. 5, 1943. [111]

[Title of District Court and Cause.]

AFFIDAVIT OF OSCAR R. CUMMINS IN
RESPONSE TO AFFIDAVIT OF EDWARD MUHL

State of California

County of Los Angeles—ss.

Oscar R. Cummins, being first duly sworn deposes and says:

That he makes this supplementary affidavit in order to answer various statements contained in the affidavit of Edward Muhl.

Affiant avers that the conversation referred to in the affidavit of Edward Muhl, lines 19 to 23, did not take place on March 28, 1943, but in truth and in fact took place after the conclusion of the picture "Fired Wife," viz., sometime in April, 1943.

Your affiant further avers that the allegations of Edward Muhl in his affidavit, lines 23 to 31, are inaccurate in that at said time and place, viz., after the conclusion of the production of the motion picture "Fired Wife," sometime in April, 1943, said Edward Muhl inquired of your affiant in words and substance whether or not affiant had heard a rumor that Metro-Goldwyn-Mayer was interested in Robert Cummings, to which your affiant replied that he had not heard about it; your affiant did inform said Edward Muhl that P-R-C, a producing organization, had called affiant and asked whether or not

Robert Cummings was available [112] for the making of a motion picture with that organization.

Your affiant avers that the conversation to which said Edward Muhl refers (lines 28 to 31, page 2 of his affidavit), viz., "and he told them that Cummings was engaged in work in connection with the establishment of an air shuttle service and that if anybody wanted him they would have to see General Arnold of the Army Air Corps to get him," is inaccurate in that it was said Edward Muhl who made that statement to your affiant in the first place, and in the second place, said conversation took place subsequent to May 29, 1943, after plaintiff had terminated his contract with the defendant corporation.

Your affiant avers, in answer to that portion of the affidavit of Edward Muhl on page 3 thereof, lines 18 to 24 inclusive, that your affiant had a conversation at Universal Studio with the said Edward Muhl after the termination of the contract by the plaintiff, at which time and place the said Edward Muhl stated to your affiant in words and substance as follows: "Why didn't you ask me for Bob's (Cummings) check?"

Affiant avers that the statement in the affidavit of Edward Muhl on page 3, beginning on line 24: "In the past when any question arose as to the amount due Mr. Cummings, Oscar Cummins invariably contacted me," is true to this extent only: That when there was a question concerning the Amount Due, affiant did contact

Edward Muhl, but affiant never contacted Edward Muhl or any other executive to obtain the weekly check of the plaintiff which was due under the contract, but on the contrary, merely called at the cashier's window.

Affiant avers that Robert Cummings enlisted in the Reserves of the Army Air Force on July 14, 1943, under enlistment number 3970-3087, approximately six (6) weeks after the cancellation of his contract with the defendant corporation.

Further deponent saith not.

OSCAR R. CUMMINS

Subscribed and sworn to before me this 4th day of November, 1943.

(Seal)

LEO K. GOLD

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Nov. 5, 1943. [113]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

The permission of the Court first had and obtained, defendant hereby amends its answer to the complaint of plaintiff by adding thereto the following:

I.

On April 10, 1943, defendant delivered to plaintiff the following telegram:

"You are hereby instructed to report to us at our studio at Universal City, California, at the office of Mr. [121] Dan Kelley at ten o'clock Monday morning, April 12th for the rendition of your services under your contract of employment with us dated November 21, 1938, as heretofore *amendea dne rtended* in connection with the portrayal of a role in our photoplay now entitled 'Fired Wife' and/or the rendition of such other services as we may require under said contract as amended and extended."

Plaintiff failed, neglected and refused to report pursuant to said telegram, or in any manner or at all.

LOEB AND LOEB

By GRANT B. COOPER

Grant B. Cooper

Attorneys for Defendant and Cross-
Complainant [122]

[Verified.]

[Endorsed]: Filed Dec. 22, 1943. [123]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the above-named parties by and through their respective counsel:

1. Allegation I of the complaint is admitted.
2. With respect to allegation II it is admitted that a contract between plaintiff and defendant was executed on November 21, 1938, which is the contract annexed to the complaint and marked Exhibit A, and that various amendments to said contract have [124] been executed, which amendments are attached to this stipulation and Marked Exhibit A.
3. Allegation III of the complaint is admitted; provided, however, that defendant reserves the right to offer proof of the full nature of the demand, to wit, proof of the sending of the telegram of April 10, 1943, which has been made a part of Amendment One to defendant's Answer, which Amendment One has already been, pursuant to stipulation of counsel, filed in this case.
4. Allegation IV of the complaint is admitted except that the role of "Hank" was completed on May 19, 1943 instead of on May 18, 1943, as alleged.
5. With respect to allegation V of the complaint it is admitted that the written notice pleaded therein and dated May 18, 1943, was sent by defendant and received by plaintiff.
6. With respect to allegation VI it is admitted that between the dates of April 10, 1943 and May 18, 1943, both inclusive, defendant did not send, nor did plaintiff receive, any written notices of any kind or nature other

than those heretofore admitted; to wit April 10, April 15, May 18, 1943.

No written demand was made by defendant at any time after April 10, 1943 (other than the telegram of April 10, 1943) that plaintiff report to defendant in connection with any picture other than "Fired Wife" or for any services pursuant to said contract.

7. With respect to allegation VII defendant admits that Exhibit A attached to said complaint provides that any compensation due plaintiff was, and is payable on Wednesday of each week for services rendered up to and including the Saturday preceding, and defendant further admits that it failed to pay any salary to plaintiff on May 26, 1943, and has failed to pay any salary to plaintiff since said date and further that no one on behalf of defendant has paid any salary to plaintiff at any time. [125]

8. With respect to allegation VIII it is admitted that on May 29, 1943, plaintiff sent, and defendant received, the notice set forth in haec verba in allegation VIII.

9. With respect to allegation IX it is admitted that on or about June 2, 1943, defendant sent, and plaintiff received, the notice set forth in haec verba in allegation IX.

10. With respect to allegation X it is admitted that since May 29, 1943, there has been an interchange of notices and letters from defendant to plaintiff and from plaintiff to defendant the purport of which is that defendant claims that said contract still exists and subsists between plaintiff and defendant, and plaintiff claims that said contract, by reason of the material breach of defendant as herein alleged, has been terminated by plaintiff as of May 29, 1943, and no longer exists between them. In this connection it is further admitted that all of the writ-

ten notices which are appended to, and made a part of the complaint of plaintiff, the answer and/or amended answer of defendant, the affidavit of plaintiff filed in connection with the Motion for Summary Judgment and the Motion for Temporary Restraining Order may be considered as authentic and as having been sent by defendant and received by plaintiff, or sent by plaintiff and received by defendant, as the case may be. It is further admitted that since the filing of the above action defendant has sent, and plaintiff has received, two other notices dated respectively November 15, 1943 and December 20, 1943, both of which are appended hereto and marked Exhibit B.

11. Oscar Cummins was at all times mentioned in the complaint or any of the pleadings the agent and representative of Robert Cummings and was duly authorized by plaintiff to talk and act in all matters in which he purported to or did talk or act.

12. No lay-off time was available to defendant at the time plaintiff was placed upon suspensions and none of the [126] suspensions ordered by defendant were ordered because of any lay-off time to which defendant was entitled.

Counterclaim of Defendant and Answer Thereto

1. The admissions already made by the answer of plaintiff to the counterclaim of defendant are accepted and stipulated to as facts.

Fourth Cause of Action

1. Reference in allegation I of the fourth cause of action to the repleading of paragraphs II to IV, both inclusive, of the third cause of action in the complaint is hereby eliminated.

2. The admissions of the answer to the fourth cause of action of the complaint are accepted and stipulated to as facts.

All stipulations of fact herein made are not limited to the causes of action or particular pleading under which they are herein classified but may be used for all purposes as facts on any and all issues arising and tried in the action.

Neither party shall be limited to or circumscribed in its or his right to object to the materiality of any of the foregoing stipulated facts, and further neither party is precluded from adding to or enlarging upon the facts stipulated to, all subject to law and the rules of evidence.

In the event any facts herein stipulated should be at variance with the truth, either party shall have the right to submit evidence at any time before the conclusion of the trial to show the truth. To the best knowledge and belief of each of the parties the facts as herein stipulated to are completely accurate. [127]

ROTH AND BRANNEN and
JOSEPH J. CUMMINS

By Roth

Attorneys for Plaintiff and
Cross-Defendant.

LOEB AND LOEB

By.....

Attorneys for Defendant and
Cross-Complainant. [128]

EXHIBIT A

Universal City, California
January 30, 1941

Mr. Robert Cummings
c/o Universal Pictures Company, Inc.
Universal City, California

Dear Mr. Cummings:

This is to confirm our advice to you that commencing with the photoplay of Loew's Incorporated now entitled "Free and Easy" in which you rendered services and continuing until further notice to you, we will pay you, conditioned always upon the full and complete performance by you of each and all of your obligations and agreements under your contract of employment with us dated November 21, 1938, as heretofore extended, a bonus of Twenty-five Hundred Dollars (\$2500.00) for each complete photoplay in which a role is portrayed and completed by you.

You hereby acknowledge and agree that the payment of each bonus herein provided for is and will be entirely voluntary on our part and that accordingly we may suspend the payment of any bonus to you or decrease or increase the amount thereof or we may at any time at our option and in our sole judgment and discretion discontinue the payment of any further bonus or bonuses to you without liability to you.

You further acknowledge and agree that neither the execution of this agreement nor the payment of any bonus

to you shall change, alter, amend or affect said contract of November 21, 1938 in any manner or particular whatsoever.

Concurrently with the execution hereof we have paid you the sum of Twenty-five Hundred Dollars (\$2500.00), being the bonus herein provided for with respect to said photoplay now entitled "Free and Easy," receipt of which sum is hereby acknowledged by you. [129]

If the foregoing is in accordance with your understanding and agreement, kindly indicate your approval and acceptance thereof in the space hereinbelow provided.

Yours very truly,

UNIVERSAL PICTURES COMPANY, INC.

By CLIFF WORK (Signed)

Vice-President

And EDWARD MUHL (Signed)

Assistant Secretary

Approved and Accepted:

ROBERT CUMMINGS (Signed)

(Robert Cummings) [130]

Universal City, California

January 31, 1941

Mr. Robert Cummings
c/o Universal Pictures Company, Inc.
Universal City, California

Dear Mr. Cummings:

This will confirm the following agreement between us with reference to your contract of employment with us dated November 21, 1938, as heretofore extended:

1. We agree that during the period from the date of this agreement to the expiration of the present term of your employment under said contract (to wit, the period of employment provided for in subdivision (b) of paragraph 23 of said contract), the time during which you may be laid off without pay as provided for in paragraph 22 of said contract shall not exceed an aggregate period of two (2) weeks. It is agreed, however, that if during said period you shall be laid off without pay in such manner that the remaining unused portion of said aggregate period of two (2) weeks shall be less than a full week, we may, nevertheless, lay you off without pay for the full unused portion of said aggregate period of two (2) weeks to the end that we shall in any event be entitled to lay you off without pay during the afore-said period for an aggregate period of two (2) full weeks, notwithstanding that the last portion of said lay-off may be for less than a week.

2. In the event of the exercise by us of any one or more of the options granted us under the terms of subdivisions (c) to (g) inclusive, of paragraph 23 of said contract of November 21, 1938 (there being no obligation whatever upon us to exercise any of said options), we agree that during the period of employment provided for in each respective subdivision of said paragraph 23, you shall be entitled to one (1) vacation of at least four (4) consecutive weeks, and that during at least two (2) weeks of each [131] said vacation compensation shall be payable to you under said contract (the exact period or periods during which compensation shall be so payable to be specified by us), and that except for the aforesaid requirement that compensation be payable to you under said contract during at least two (2) weeks of said vacation, the remaining portion or portions of said vacation may occur at a time or times when you are laid off without pay. It is, of course, understood that you shall not have the right during said vacation to render any services of any kind for yourself or for any person, firm or corporation other than ourselves without our written consent first had and obtained. The time at which you are to take said vacation shall be designated by us, it being expressly understood that we shall not be precluded by the designation of a date for the commencement of said vacation from thereafter changing said date at any time to an earlier or later date.

3. It is expressly understood that each and all of the obligations and agreements on our part herein set forth are conditioned upon the full and complete per-

formance by you of each and all of your obligations and agreements under said contract of November 21, 1938, and that in the event of a breach by you of any of said obligations and/or agreements we shall have the right to terminate this present agreement without prejudice to any rights or remedies which we may have under said contract of November 21, 1938, or at law or in equity.

4. Except as hereinbefore expressly provided, said contract of November 21, 1938 is not modified or amended in any manner or particular whatsoever.

If the foregoing is in accordance with your understanding and agreement, kindly indicate your approval and acceptance in [132] the space hereinbelow provided.

Yours very truly,

UNIVERSAL PICTURES COMPANY, INC.

By CLIFF WORK (Signed)

Vice-President

(C.S.)

And EDWARD MUHL (Signed)

Assistant Secretary

Approved and Accepted:

ROBERT CUMMINGS (Signed)

(Robert Cummings) [133]

Universal City, California
December 31, 1941

Mr. Robert Cummings
c/o Universal Pictures Company, Inc.
Universal City, California

Dear Mr. Cummings:

This will confirm our agreement that commencing with the photoplay now entitled "Saboteur", and continuing until the expiration of your contract of employment with us dated November 21, 1938, as amended, we will pay you a bonus of Seven Thousand Five Hundred Dollars (\$7500.00) for each complete photoplay under said contract of employment in which a role is portrayed and completed by you.

Payment of said bonus shall be conditioned upon the full and complete performance by you of each and all of your obligations and agreements under said contract of employment, as amended.

This agreement replaces that certain agreement between us dated January 30, 1941, said agreement of January 30, 1941 being hereby terminated effective immediately.

If the foregoing is in accordance with your understanding and agreement, kindly indicate your approval and acceptance thereof in the space hereinbelow provided.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By CLIFF WORK (Signed)

Vice President

(Corporate Seal)

And EDWARD MUHL (Signed)

Assistant Secretary.

Approved and Accepted:

ROBERT CUMMINGS (Signed)

(Robert Cummings) [134]

EXHIBIT B

UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

November 15, 1943

Registered Mail

Mr. Robert Cummings

c/o Mr. Oscar Cummins

9441 Wilshire Boulevard

Beverly Hills, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks commencing October 11, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Assistant Secretary [135]

UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

December 20, 1943

Registered Mail

Mr. Robert Cummings
c/o Mr. Oscar Cummins
9441 Wilshire Boulevard
Beverly Hills, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks commencing November 16, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Assistant Secretary

Edward Muhl
jab/j

[Endorsed]: Filed Dec. 30, 1943. [136]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS,

Judge Hollzer, December 31, 1943

At the time defendant's original application to amend its answer was denied the court ruled that such determination was without prejudice to a further application by defendant to amend its answer, solely for the purpose of pleading the facts upon which it was asserting that plaintiff had misled defendant to its prejudice by reason of certain representations claimed to have been made by him and his agent. Within the time allowed defendant has tendered a proposed second amendment to its answer.

In the proposed amendment defendant has alleged, among other matters, that from time to time during the period extending from about April 5, 1943 to and including May 28, 1943 plaintiff either in person or through his agent represented to defendant that he would join a certain branch of the military service for the duration of the war, and that for that reason would not report at defendant's studio to portray a certain role which it had requested him to portray in a certain photoplay; also that on April 13, 1943, defendant notified plaintiff's agent that it had received the aforementioned information from plaintiff, that the latter had refused to report on April 12, 1943, [137] that at the same time defendant informed plaintiff's agent of its intention to suspend plaintiff from the payroll as of the date last mentioned, and that plaintiff's agent informed defendant that its action was proper

and in addition that he was endeavoring to have plaintiff come to defendant's studio to discuss the situation. Likewise in said pleading defendant has asserted that as late as May 28, 1943 plaintiff continued to lull it into the belief that he was not holding himself available for services under the contract sued upon and was not demanding compensation but on the contrary he informed defendant that he was engaged in work connected with establishing an air shuttle service and that anyone wanting him would have to consult General Arnold of the Army Air Corps. It is further pleaded in said amendment that at no time since April 10, 1943 did plaintiff intend to fulfill the terms of his contract, that on the contrary, at all times since said date he has devoted himself exclusively to the work of the Civil Air Patrol and as an instructor for the Army Air Force Cadets, and that particularly since July 16, 1943 he has been a member of the Air Force Reserve of the United States Army. Defendant has also charged in said amendment that plaintiff's alleged demands for payment of compensation, if any occurred, were made in bad faith.

If the theory of the aforementioned amendment to the answer be that plaintiff not merely asserted that he would be unable or would refuse to perform his contract in a specific respect, but that he was guilty of a distinct and unequivocal, absolute refusal to perform the whole contract, or of a covenant going to the whole consideration, at least for [138] the duration of the war, and that because of such refusal on his part defendant had exer-

cised its right of suspension under the contract and had refused to pay any compensation to him, then we are inclined to hold that such allegations, when established by the evidence, would constitute a defense to the present lawsuit. Exactly what defendant expects to prove is not wholly clear from the proposed amendment.

Plaintiff opposes the allowance of such amendment, and has urged that the course of conduct pursued by defendant, as indicated in its various notices to the plaintiff, has been inconsistent with and contradictory to the position defendant now seeks to take under said pleading. While there is much to be said in support of plaintiff's contention, nevertheless, we are persuaded that defendant should be allowed to make as complete a record as the facts warrant, and that upon the close of the evidence the court will be required to determine what legal conclusions should be drawn therefrom. Accordingly defendant should be allowed to file the proposed second amendment to the answer.

Minute Order

For the reasons set forth in the memorandum of conclusions this day filed It Is Ordered that defendant's proposed second amendment to its answer be filed.

[Endorsed]: Filed Dec. 31, 1943. [139]

[Title of District Court and Cause.]

PROPOSED SECOND AMENDMENT TO
ANSWER

Defendant hereby amends its answer to the complaint of plaintiff, by adding thereto the following:

I.

Before April 3, 1943, defendant had informed plaintiff that he was to be assigned, and had been assigned, to portray the role of Hank in a forthcoming production to be produced by defendant and then entitled "Fired Wife." On or about April 3, 1943, plaintiff notified defendant that he was on the verge of [140] refusing to do the part in the picture "Fired Wife" partly because he was unhappy about the selection of the director and partly because he was seriously thinking of signing up with the Civil Air Patrol or the Army for the duration of the war. On or about April 5, 1943, plaintiff notified defendant that he had made up his mind not to do the picture because he felt that it was his duty to give one hundred percent of his time to war work and that he was signing up with the Civil Air Patrol for the duration. Before said notification defendant was aware of the fact that plaintiff was a flyer, devoted part of his time to the Civil Air Patrol and on occasions wore the uniform of the Civil Air Patrol.

II.

On April 10, 1943, defendant delivered to plaintiff the telegram set forth in paragraph I of its first amendment to its answer on file herein.

III.

On April 13, 1943, defendant notified plaintiff's exclusive agent, personal representative and lawyer, Oscar Cum-

mins, that defendant had theretofore been informed by plaintiff personally that he, plaintiff, was going to join, or had joined, the Civil Air Patrol for the duration and would not report for his role in the production of the photoplay "Fired Wife"; that plaintiff had failed, neglected and refused to report on April 12, 1943, pursuant to defendant's telegram of April 10, 1943, and that defendant, to establish a clear position, intended to suspend plaintiff from the payroll as of that date. Said Oscar Cummins, acting in the capacity of plaintiff's exclusive agent, personal representative and lawyer, at said time informed defendant that such action was entirely proper, and further informed defendant that he, the said Oscar Cummins, was endeavoring to have plaintiff come in to defendant's studio to discuss the situation with [141] defendant's assistant secretary and casting director.

IV.

On April 15, 1943, defendant delivered to plaintiff the notice set forth in paragraph III of the first alleged cause of action in plaintiff's complaint. Plaintiff failed and neglected to report or respond in any manner at all to said notice.

V.

On May 18, 1943, plaintiff continued to fail and neglect to report or respond to defendant's notices of April 10 and April 15 in any manner, or at all. As a direct result of all of plaintiff's representations and conduct as hereinbefore set forth defendant believed that it was plaintiff's intention to devote one hundred percent of his time to the Civil Air Patrol of the United States Army, or other similar pursuits other than his obligations under the contract and would not report to defendant under the terms and provisions of said contract, or at all, and

believed that it would be a useless and idle act to make plans and expend money for the preparation of productions and roles in which plaintiff's unique and artistic talents would fit, and believed that it would be a useless and idle act to offer further roles to plaintiff until plaintiff notified defendant that he had changed his plans or was willing to comply with the terms and conditions of his contract.

VI.

Relying on the representations and conduct of plaintiff, as hereinbefore set forth, defendant did not make plans and did not expend any money for the preparation of productions and roles in which plaintiff's unique and artistic talents would fit, and did not offer further roles to plaintiff, and relying and acting on plaintiff's representations and conduct, as hereinbefore set forth, and to protect its rights under the contract, defendant [142] served and delivered the notice of May 18, 1943, as set forth in paragraph IV of the first alleged cause of action in plaintiff's complaint. On May 18, 1943, the services of the substitute for plaintiff in the portrayal of the role "Hank" in the production of the photoplay "Fired Wife" were completed.

VII.

Plaintiff, with knowledge of all the matters hereinbefore set forth and with knowledge that defendant was at all times ready, willing, able and anxious to use his said services and to fulfill its obligations under the contract, made his alleged demands for payment of compensation, if any such demands were made, designedly and in bad faith to employees of defendant who had neither the authority nor the duty to refuse to pay, to order payment of compensation or to communicate any demand

for payment to any of the officers or employees of defendant having such authority. If any such demand was made, no officer nor employee having authority to order payment of compensation, to refuse payment of compensation or to communicate any such demand was ever notified as alleged in paragraph VII of plaintiff's complaint, or in any manner or at all.

VIII.

Never at any time after April 5, 1943, was defendant aware, nor did defendant believe that plaintiff was holding himself available or in readiness to perform any of his obligations under his contract, and defendant at all times was ready, able, willing and anxious to use his services and to pay therefor in accordance with its contract.

IX.

Before plaintiff's notice of May 29, 1943 claiming defendant's breach of the contract for nonpayment of compensation, as alleged in paragraph VIII of plaintiff's first alleged cause of action in his complaint herein, and on May 27 and May 28, 1943, [143] plaintiff acting through his exclusive agent, personal representative and lawyer continued to lull defendant into the belief and reliance that plaintiff was not holding himself available for services under his contract and was not demanding compensation, but specifically informed defendant, and he did inform defendant, among other things, that plaintiff was engaged in work in connection with the establishment of an air shuttle service and if anyone wanted him, they would have to see General Arnold of the Army Air Corps to get him.

X.

Defendant is informed and believes, and upon such information and belief alleges, that at no time since April 10, 1943, did plaintiff intend to fulfill the terms and provisions of his contract and at all times since said date was devoting all of his time to the Civil Air Patrol and as an instructor for the Army Air Force Cadets at Mira Loma Flying Academy, Seventh Army Air Forces Flying Training Detachment at Oxnard, California, and since July 16, 1943, has been a member of the Air Force Reserve of the United States Army.

XI.

Defendant at all times herein would have respected, and now respects, any patriotic motive and desire on the part of plaintiff to serve his country. Defendant, however, has at all times objected, and now objects, to plaintiff's rendering his services as an actor or in any other capacity set forth in the contract to persons, firms or corporations other than defendant contrary to the terms and provisions of paragraph 3 of the contract and any other provision of said contract.

XII.

Plaintiff is wholly without equity because of all the facts hereinbefore alleged to invoke the aid of this Court to terminate and rescind his obligations to perform the contract, and [144] is in default of performance thereof.

XIII.

Plaintiff is estopped to claim a breach of the contract on the part of defendant because of all of the facts hereinbefore alleged and is wholly without equity to invoke the aid of this Court to terminate and rescind his obligations to perform the contract.

XIV.

Defendant is now willing, and now offers, to do full equity by plaintiff to fully pay and restore to plaintiff any sum or sums of money or compensation this Court may find due to plaintiff by virtue of any mistake of fact, mistake of law, or for any other reason hereinbefore shown by the facts to have existed or now existing.

Wherefore, defendant prays:

(1) That this Court find and declare that defendant has at all times fulfilled all of the terms and provisions of the contract on its part to be performed;

(2) That this Court find and declare that plaintiff breached his contract in the manner and at the time set forth in this Amendment to Answer;

(3) That should this Court find and declare that defendant breached the contract on May 26, 1943, or at any other time, said breach in equity was not a material breach;

(4) That should this Court find and declare that defendant breached the contract on May 26, 1943, or at any other time, the Court also find and declare that plaintiff was guilty of prior breaches in the manner and at the time set forth in this Amendment to Answer, and in equity and good conscience plaintiff cannot complain or obtain relief from this Honorable Court;

(5) That should this Court find and declare that [145] defendant breached the contract on May 26, 1943, or at any other time, plaintiff is estopped by his conduct

and representations to defendant, and is wholly without equity to complain or obtain relief from this Honorable Court;

(6) That should this Court find and declare that defendant breached the contract on May 26, 1943, or at any other time, defendant be relieved of said breach and relieved of any forfeiture of any of its rights under the contract on such equitable terms as this Court may deem meet and just in the premises;

(7) That this Court find and declare that defendant is entitled to a permanent injunction herein restraining and enjoining plaintiff from rendering, offering to render or agreeing to render his services to any person, firm or corporation other than defendant until such time as he shall have complied with his obligations under the contract and shall no longer be obligated to perform services for defendant, and

(8) For costs and for such other and further relief as to this Court may seem proper or equitable.

LOEB AND LOEB

By GRANT B. COOPER
GRANT B. COOPER

Attorneys for Defendant and
Cross-Complainant [146]

[Verified.]

[Endorsed]: Lodged Dec. 22, 1943. Filed Jan. 3, 1944. [147]

[Title of District Court and Cause.]

PLAINTIFF'S TRIAL MEMORANDUM OF POINTS
AND AUTHORITIES AND ITS OBJECTIONS
TO THE PROPOSED SECOND AMENDMENT
TO DEFENDANT'S ANSWER

Plaintiff objects to the Proposed Second Amendment to the defendant's answer and makes a part of his objections filed herein the objections heretofore filed under the caption "Points and Authorities in Opposition to Motion for Permission to File Amendment to Answer" filed by plaintiff to the motion of defendant for permission to file amendment to answer, which motion was heretofore heard and denied. Plaintiff also refers to the oral discussion and argument made by plaintiff in opposition to said motion at the time of the hearing thereof. Each to wit, said "Points and Authorities in Opposition to Motion for Permission to [148] File Amendment to Answer" and the oral discussion. (reduced to Reporter's Transcript).

Plaintiff in order to make clear his reasons (legal and factual) and upon which he objects to the filing of the proposed second amendment deems it advisable to set forth the issues of law and fact; in order to avoid duplication, plaintiff (it is hoped with the court's permission and indulgence) will at this time because it is necessary so to do in connection with his objections, file his trial memorandum of points and authorities.

In the event the first cause of action is decided for plaintiff, the second cause (with limitations hereinafter stated would necessarily be decided the same way) and there would, of course, be no necessity for trial on the

fourth cause (the third cause now being eliminated) or on the counterclaim.

The issue of estoppel sought to be raised by "Proposed Second Amendment to Answer" should not be allowed because (a) it is no way germane to the issues of the case as is demonstrated by the admitted facts; (b) no issue of estoppel is properly pleaded by the allegations of the proposed second amendment and (c) even though the issue of estoppel may be properly pleaded in the proposed second amendment it is clear from the admitted facts in the record as well as from the allegations of the proposed second amendment that defendant is estopped to raise the issues of estoppel predicated upon facts it proposes to prove.

I.

The Primary Issues for Decision on the Facts and the Law

These issues were previously stated by the court in its discussion on Motion for Summary Judgment and the Motion for Temporary Restraining Order, as follows: [149]

For the plaintiff:

"The basis for the action would seem to be that the plaintiff contends, by virtue of the facts brought out in the complaint and the answer, and also somewhat amplified by the affidavits, that along sometime in May of this year he became entitled to compensation under the contract that had been entered into between the parties sometime in 1938; that even assuming that the defendant was entitled to the relief from paying him any compensation during the period required for the making of a certain pic-

ture, in the playing of which the plaintiff had refused to participate, and even assuming that the defendant was entitled to declare the contract suspended for the period referred to, that from and after the determination of such period the plaintiff was entitled to his compensation as stipulated in the contract; that the defendant having taken the position that he was not entitled to be paid for this subsequent period, and having refused to pay any compensation for this later period, the defendant has breached the contract and, therefore, the plaintiff is entitled to the benefit of the termination thereof, notice of which he has given."

For the defendant:

"The Court: Now, the defense here asserts, firstly, that no demand was made on behalf of plaintiff for compensation through the appropriate channel, but further—and this would seem to be [150] the crux of the defense—that the terms of the contract entitle the defendant to continue the suspension beyond the period previously mentioned and to continue that suspension at least until the plaintiff shall affirmatively in some manner inform it that he is prepared to resume work under the contract.

Up to this point have I correctly appraised the position of the defense?

Mr. Newmark: Yes, your Honor. There may be additional defenses in so far as the claim of breach of contract is concerned. In other words, these are our basic points that your Honor has stated, but even if it were to be held that these points were not well taken, we would still maintain that

there has been no material breach of contract or that the plaintiff is in no position to make that assertion. * * * * * But that is an alternative argument, and your Honor has stated correctly our main point."

II.

The Record

The stipulation of facts heretofore executed and which is or should be on file, all affidavits heretofore filed by either party, the pleadings, all records or minutes of the court, and specifically admissions of counsel (on both sides) made in open court. Attached hereto in the form of an appendix are excerpted the pertinent admissions of fact already in the record.

III.

The Issues of Fact [151]

A. First Cause of Action.

(1) Did plaintiff make demand for salary and did defendant refuse to pay?

(2) Did defendant make the demand of April 10, 1943 in writing by telegram (pleaded in defendant's first amendment to the answer) and did plaintiff receive the same (plaintiff admits a demand, Allegation III of Complaint).

B. Second Cause of Action will stand or fall with the first.

C. Fourth Cause of Action.

(1) Same as first cause.

(2) Proof of allegations in Paragraph II of Fourth Cause, pages 13-14 of Complaint.

IV.

Issues of Law

A. First Cause of Action.

(1) Defendant Asserts:

Under its contract it had the right to and that it did by its notices suspend the compensation of plaintiff for the period required to complete the portrayal of "Hank" in "Fired Wife" and until such time thereafter as plaintiff reported to defendant ready, able and willing to work.

Plaintiff Answers:

(i) The contract gave no such right.

(ii) Even though the contract did give such right, the facts as they existed and as they are recited in the demand of April 10th (conceding for purposes of this point that it was received in its telegraphic form) did not warrant [152] the position taken by defendant.

(iii) Even though the contract gave such a right asserted by defendant and assuming the facts warranted the position taken by the defendant, defendant elected a specific right in its notices and deliberately limited its right of suspension to a definite period. Assuming that defendant had the right it asserts and did not deliberately make an election to limit the right in its notices, defendant did nevertheless by its notices limit the right to a specific period because the notices were so ambiguous as to mislead plaintiff to his prejudice, and defendant is, therefore, now estopped to assert that it did not limit the right of suspension to a specific period.

(iv) If for a particular breach defendant instead of electing to terminate elects to suspend and extend it cannot (irrespective of any contractual terms assuming there

are such) suspend and/or extend for any period longer than the actual breach because any further suspension and extension would be in the nature of a penalty and, therefore, invalid.

(v) Assuming defendant has the contractual right it asserts, that the facts warranted its exercise, that defendant did not elect in its notices to exercise a specific right and that defendant is not estopped to deny that it exercised a specific right, plaintiff when he appeared at the office of defendant and demanded his salary [153] gave such notice as would be sufficient to a reasonably prudent person that he was reporting ready, able and willing to work.

(2) Defendant Asserts:

Assuming a breach on its part, the breach was not sufficiently material and therefore, plaintiff did not have the right to terminate his contract.

Plaintiff Answers:

The breach was a material breach sufficient upon which to predicate the termination of the contract.

(3) Defendant Asserts:

If plaintiff is correct in his statement of the law as hereinabove outlined, that plaintiff is nevertheless estopped to take advantage of his rights by reason of alleged estoppel facts pleaded in the proposed second amendment to the answer.

Plaintiff Answers:

(i) No estoppel facts exist.

(ii) No estoppel facts have been properly pleaded.

(iii) Conceding that estoppel facts do exist and that they are properly pleaded and that they are found in favor of defendant. defendant by its conduct and its notices is estopped to assert any such estoppel.

B. Second Cause of Action.

This is a money count and will be decided on the issues set forth in the first cause of action. [154]

C. Fourth Cause of Action.

Plaintiff Asserts:

Because of the facts alleged in the Fourth Cause of Action, defendant did not have the right to demand that he appear in "Fired Wife" and that his failure to appear was not a breach on the part of plaintiff but a breach on the part of defendant and that because of said breach there has been a material failure of consideration justifying the court in declaring a rescission of the contract. Defendant, of course, denies the facts and the legal position asserted by plaintiff resulting from the facts if proved.

* * * * * * * *

Respectfully submitted,

JOSEPH J. CUMMINS
ROTH AND BRANNEN

By Lester Wm. Roth

Attorneys for Plaintiff and Cross-Defendant.

[Endorsed]: Filed Jan. 4, 1944. [181]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS

Judge Hollzer's Calendar,

March 6, 1944.

This lawsuit arises out of a certain contract of employment entered into between the parties under date of November 21, 1938. The issues requiring determination are presented by the first two counts of the complaint, the answer thereto and the amendments to the answer.

Count one constitutes a cause of action for equitable relief, namely, for termination of said contract upon the ground of the alleged breach thereof by defendant in failing and refusing to pay plaintiff certain compensation claimed to be due thereunder. The second count is a cause of action for the recovery of certain compensation alleged to be owing and unpaid under the terms of said contract.

Defendant relies upon several defenses. It contends, firstly, that plaintiff breached the contract, in that he failed and refused to report at its studio on April 12, 1943, to portray a certain role in a photoplay in which he was then cast, pursuant to its telegraphic notice addressed to him under date of April 10, 1943; that by reason of said breach, defendant became entitled to, and did, exercise the right to engage another person to portray such role, and to refuse to pay plaintiff any compensation until the completion of such role by another person, also the right to extend the term of [252] said contract for a period equivalent to the time required for the completion of such role by another person, and that said role was completed by another person on May 19, 1943.

Secondly, defendant charges that plaintiff further breached the contract, in that he failed and refused to report at its studio on April 12, 1943, and at all times since has failed and refused, to render such additional services as it might require of him under the contract and pursuant to said telegraphic notice; that by reason of said breach it became entitled to, and did, exercise the further right to refuse to pay him any compensation during the period of such failure and refusal, to-wit: the period from April 12, 1943 to date and likewise became entitled to, and did, exercise the still further right to extend the term of the contract for a period equivalent to the period during which such failure or refusal has continued.

Thirdly, defendant takes the position that at and prior to the time of his failure and refusal to report at its studio on April 12, 1943 plaintiff had notified defendant to the effect that he had determined to devote 100% of his time to war work, particularly to sign up with the Civil Air Patrol for the duration of the war, and hence during such period would not engage in the work of making pictures; that therefore it became entitled to, and did, exercise the right to suspend him from the payroll, in other words, to refuse to pay him any compensation for the duration of the war; and that until plaintiff should report at its studio and notify defendant that he was ready and willing to resume work under the contract, such suspension would remain in effect indefinitely.

Fourthly, defendant contends that from time to time from about April 5, 1943 to May 28, 1943, inclusive, plaintiff either in person or through his agent, represented to it in [253] substance that he would join the military service for the duration of the war, and for that reason would not report at its studio to portray a role which he had been cast by defendant to portray in

a certain photoplay; that on April 13, 1943 defendant notified plaintiff's agent it had received the aforementioned information from plaintiff, also that he had refused to report on April 12, 1943, and that it intended to suspend him from the payroll as of the latter date; that plaintiff's agent replied that its action was proper and that he was endeavoring to have plaintiff come to its studio to discuss the situation; that plaintiff continued as late as May 28, 1943 to lull defendant into the belief that he was not available for services under the contract, but instead was engaged in work of a military character and that anyone wanting him would have to consult the head of the Army Air Corps; that at all times since April 10, 1943, plaintiff has devoted himself exclusively to the work of the Civil Air Patrol, and as an instructor for the Army Air Force Cadets, that at no time since said date did he intend to fulfill his obligations under the contract, and that ever since July 16, 1943, he has been a member of the Air Force Reserve of the United States Army; that defendant believed, relied and acted upon the aforementioned representations on the part of plaintiff to its prejudice; and hence that plaintiff is without equity and is estopped to claim that defendant breached the contract.

Fifthly, defendant argues that plaintiff further breached the contract in this: that whereas he agreed that until the expiration of the term thereof he would be "available at all times in Los Angeles, California, or at any other place the producer (defendant) may designate, unless excused in writing by the producer," (see contract, paragraph 19) plaintiff absented himself from Los Angeles County continuously [254] from May 19th to May 29th, 1943 without defendant's knowledge or consent.

Lastly, defendant urges that, if the Court should find that on May 26, 1943, compensation was owing and due from defendant to plaintiff and that by reason of its failure and refusal to pay such compensation it breached the contract, then such default resulted from an excusable mistake on its part, that it is entitled to be relieved from such default, and to that end it is willing and offers to pay to plaintiff any compensation the Court may find due him and also otherwise to do full equity.

At the opening of the trial, the Court stated, in effect, that, taking into consideration the admissions made by the pleadings and the further facts incorporated in the stipulation of facts filed herein, a prima facie case entitling plaintiff to judgment upon the first count would be established upon proving the allegations of the last sentence of paragraph VI and the allegations comprising the first sentence of paragraph VII of said count. The last sentence of Paragraph VI reads as follows:

"No demand, oral or written, was made by defendant at any time after April 10, 1943 that plaintiff report to defendant in connection with any other picture or for any services pursuant to said contract."

The first sentence of paragraph VII reads:

"On May 26, 1943, plaintiff, pursuant to the terms and provisions of said contract, appeared at the offices of the defendant and demanded of defendant payment of salary as fixed by said contract for that portion of the week beginning May 19, 1943 and ending May 22, 1943." [255]

Save in the particulars hereinafter pointed out, the evidence establishes, without substantial contradiction, the following facts. Between the date of the execution

of the contract involved herein and March 28, 1943, plaintiff had portrayed roles in at least fifteen photoplays, eleven of which had been produced by defendant, and with its consent he had appeared in additional motion pictures produced by others. Excepting the last three months of 1942, he had been occupied during at least a portion of each month of that year in performing services under said contract. During March, 1943, more particularly between the 10th and the 23rd thereof, he had portrayed a role in the last photoplay in which he worked for defendant.

Prior to February, 1943, disputes had arisen between plaintiff and defendant, particularly one of defendant's executives named Daniel Kelley, who was in charge of its creative talent, including players, writers, directors and producers. These differences arose out of complaints by plaintiff, criticising the quality of the photoplay productions in which defendant required him to appear, including such matters as the type of play, the cast and the director. About February or March of the same year, these difficulties became so acute that the relations between plaintiff and Kelley became quite strained and as a consequence the latter was replaced, so far as defendant's dealings with plaintiff were concerned, by one Robert Speers, another executive, who was defendant's casting director. Thereafter, and extending over a period of at least several weeks prior to April 10, 1943, several conversations were had between Speers and plaintiff, and the latter's agent, Oscar Cummins, some with the former and some with his agent, on the subject of defendant's proposed production of a certain photoplay [256] entitled "Fired Wife." These discussions dealt primarily with such matters as the quality of the production, the script for the same, the contemplated

cast, the type of director and the role which plaintiff would be asked to portray, namely, that of Hank.

About the first week of April, 1943, plaintiff and Speers held a lengthy conference which lasted from two to three hours, and during which the latter disclosed for the first time certain detailed information respecting said picture, particularly who had been selected to direct the making thereof and also the names of the principal members of the cast. Plaintiff took vehement exception to what he characterized as cheapening the production. He complained that the director was not qualified and was not sufficiently experienced to direct the making of a first-class photoplay, and, further, that the actress selected to portray the feminine lead and also certain other members of the cast lacked the requisite qualifications to portray the respective roles to which they had been assigned. He also charged that Speers had represented to him that the photoplay would be produced as a Class A or highest quality picture in every respect; that the picture would be directed by an outstanding director in the motion picture industry, comparable to one Leo McCarey, that the feminine lead would be portrayed by Teresa Wright and that other principal parts would be portrayed by Charles Coburn and Eddie "Rochester" Anderson, all being outstanding artists in said industry. He also insisted that relying upon such representations he had consented to portray the role of Hank in the picture and that the proposed production as finally then being disclosed to him was a repudiation of such representations. He pointed out that he was a professional flyer, as well as a professional actor; [257] that the services of the former were then greatly in need and that rather than waste his time making a motion picture, which he did not feel would do anything for the war effort, he

should fly for the Civil Air Patrol. During this conference, Speers asked plaintiff whether he felt he should stay in the Civil Air Patrol for the duration, to which he replied that he was in the Civil Air Patrol for the duration, but that this had nothing to do with whether he made pictures or not. The former insisted that plaintiff's objections to the director and the cast were not well founded, and that the production of the picture would prove to be one of the best. Likewise, he reminded plaintiff that he had volunteered to be the intermediary between the latter and Kelley, also that this was the first time since the latter's differences with Kelley that it had become possible to work with him on amicable terms about a production, and that this was their first opportunity to get together, and that he was anxious to make a go of it. He added that it would be painful to him to see this first sort of reunion between plaintiff and himself fail, although it meant nothing to him in a monetary way and affected only his pride, and that a refusal on plaintiff's part to do the picture might lead to a suspension.

Plaintiff, however, took the position that if it were necessary for him to be suspended because of such a production, he would fly for Lockheed or the Civil Air Patrol during the suspension, because he didn't feel like wasting time making a picture, which he described as "crap," and that he was not going to sacrifice what he had built up over a period of years to make a production which he didn't feel had any value to the public or to himself.

During this conversation, they also discussed other subjects, including the war, navigation, and the things [258] plaintiff was teaching and other matters pertaining to flying, in which they were mutually interested. Plaintiff commented how badly he felt that because of his age he

was not allowed to enlist in any of the flying activities of the Army or the Navy and that he could not be accepted either as a cadet or in the flying crews. At the close of their talk, plaintiff stated it would be necessary for him to confer with his agent, Oscar Cummins, before reaching a final conclusion.

Shortly thereafter, according to the testimony of Cummins, and prior to April 12th, the latter conferred at defendant's studio with Speers and another of its executives, named Edward Muhl, head of its Contract Department, in an attempt to adjust the then existing difficulty, and upon said occasion plaintiff's agent suggested that the problem could be solved by having another director assigned for the picture, but this suggestion was rejected. This testimony has not been contradicted.

Some days later, this discussion was resumed over the telephone. Upon the latter occasion, according to plaintiff's testimony, the latter stated that, inasmuch as the picture "Fired Wife" had been cheapened both with respect to the director and the cast, he would not play the role of Hank. He further said that he felt the picture would not be made as it had been represented to him by Speers, namely, as an "A" or first-class production, but, instead, would prove to be a "B," or second-class production, and that, rather than waste his time on such a production, he would fly for Lockheed testing bombers, or fly for the Civil Air Patrol. Speers retorted that plaintiff was putting the studio in a terrific hole, and he evidenced resentment at plaintiff's attitude, and likewise pointed out that the position plaintiff was taking [259] might lead to his suspension. To this the latter replied that if such action on his part meant suspension, it would have to mean that, because he did not feel like playing the part of Hank.

Save in the particulars hereinafter to be noted, plaintiff's version of these two conversations is corroborated, or at least not disputed, by the testimony of Speers. In this connection it should be observed the latter testified that before taking the stand he had refreshed his recollection as to what had been said, by reading a memorandum contained in one of defendant's files and which had been recently called to his attention. This memorandum, he stated, had been dictated by him about three months after the conversations had taken place, and purported to be an inter-office communication to Muhl from himself. It recited, in substance, that on April 10th, 1943 he had a long talk with plaintiff about him doing "Fired Wife," that the latter informed him he was on the verge of refusing to do the picture, partly because he was unhappy about the selection of the director and partly because he was seriously thinking of signing up with the Civil Air Patrol or the Army for the duration of the war, that Speers had pointed out to him why such a refusal would be unfair, and that plaintiff replied he could not make up his mind whether or not to do the picture; also that during a telephone conversation held two days later plaintiff stated he had made up his mind not to do the picture, because he felt it to be his duty to give 100% of his time to war work and was signing up with the Civil Air Patrol for the duration. (Underscoring ours.)

Shortly following said telephone conversation, according to the testimony of Speers, Kelley, and Emmett Ward, assistant to Muhl, a conference was held between the three of them. [260] during which Speers reported he had just been informed by plaintiff on the telephone that the latter would not play the role of Hank, also that he had signed up, or was going to sign up, for the duration of

the war with the Civil Air Patrol, or some other military service, also that he would not do any more pictures for the duration, and knew that he was something of
..... but there
was nothing he could do about it. (Underscoring ours.)

Likewise, Kelley testified that a few days before the above mentioned conference Speers had told him about a prior conversation which Speers had had either with plaintiff or his agent, Oscar Cummins, in which one of the latter two complained about the director for the picture "Fired Wife," claiming that he was not of a caliber who should direct plaintiff and that with such a director set-up the picture was not important for plaintiff. However, this witness had no recollection that at the time Speers reported to him concerning this prior conversation the latter had claimed that either the plaintiff or his agent had said that plaintiff was thinking seriously of going into the Civil Air Patrol. Likewise, according to Kelley, it was the latter who suggested either to Muhl or to Ward that a wire be sent to plaintiff to find out if it was true that he would not be able to do any more pictures for the duration. (Underscoring ours.)

Ward further testified that about April 9, 1943 he caused to be prepared a proposed letter to plaintiff and submitted the same to Muhl for the latter's signature. However, this document was never signed and, according to Muhl, it was upon his decision that the same was not sent. The first paragraph of the proposed letter—being

the only portion having any significance in the present lawsuit—was [261] worded as follows:

"You have heretofore notified Mr. Robert Speers, by telephone, that you have been listed in the Civilian Air Patrol for the duration of the present war and will therefore be unavailable to us for the rendition of any services pursuant to your contract of employment with us dated November 21, 1938, as heretofore amended and extended. This is to notify you, therefore, that, commencing as of April 9, 1943, said contract of employment with us dated November 21, 1938, as amended and extended, shall be and is hereby suspended, both as to compensation and as to the running of the now current term of employment of said contract." (Underscoring ours.)

On Saturday, April 10th, Speers instructed his secretary to deposit with Western Union Telegraph Company three telegrams, each addressed to the plaintiff and bearing the date last mentioned. One of these telegrams was addressed:

"Mr. Robert Cummings
Care Oscar Cummins
8511 Sunset Boulevard
Los Angeles, California."

Another telegram was addressed:

"Mr. Robert Cummins
Care Oscar Cummins
527 California Bank Building
Beverly Hills, California."

The third telegram was addressed:

“Mr. Robert Cummings
14111 Sherman Way
Van Nuys, California” [262]

Except as to the address thereof, each telegram was worded identically and read as follows:—

“You are hereby instructed to report to us at our studio at Universal City, California, at 10 o’clock Monday morning, April 12, 1943, for the rendition of your services under your contract of employment with us dated November 21, 1943, as heretofore amended and extended, in connection with the portrayal of a role in our photoplay now entitled “Fired Wife” and/or the rendition of such other services as we may require under said contract, as amended and extended.

Universal Pictures Company, Inc.,
By Edward Muhl

Assistant Secretary”

(Underscoring ours.)

On the same day, at approximately 6 P. M., Speers’ secretary left these telegrams at the Beverly Hills office of the Telegraph Company. At about 10 A. M. on the following day Western Union telegraphed defendant to the effect that the locations described, respectively, as 527 California Bank Building, etc. and 8511 Sunset Boulevard, etc., were closed until morning, also that the person addressed at 14111 Sherman Way, etc. was out of the city and his address unknown, and that the company had

telephoned to Mrs. Oscar Cummins, who would relay the message. On Monday, April 12th at about 6 P. M., the Telegraph Company wired defendant to the effect that the telegram addressed to 527 California Bank Building, etc., had been telephoned on the preceding morning to the addressee's sister-in-law, who would relay the message to him.

The plaintiff, also his agent, also the latter's wife and brother, each testified, denying receiving any such message, [263] either in whole or in part. Plaintiff further denied that he had any sister-in-law, although it was admitted there had been occasions when his agent claimed to be his brother. Even though we discount such denials, nevertheless, in the light of the aforementioned reports made by the Telegraph Company to defendant it is obvious that none of the telegrams was delivered in the customary manner, either to plaintiff or to his agent, or, in fact, to anyone purporting to be in contact with him. As pointed out by the Court at the close of the oral argument, while it is probable that on April 11th one or more of the telegraph company's employees read the telegram of April 10th over the telephone to someone claiming to be plaintiff's sister-in-law and who promised to relay this message to him, it is inherently improbable that the party hearing the same copied it down or remembered all of its contents. Likewise, the most that may reasonably be drawn from that incident is that the lady who received this telephone message construed the same as a telegram from defendant requiring plaintiff to report at its studio the next morning to perform services in connection with a photoplay entitled "Fired Wife," and that she repeated this much of the message and nothing more, either to plaintiff or his agent either the same day or the next.

According to Speers, within a day or two of this last telephone conversation with plaintiff, he was informed by the latter's agent over the telephone that said agent had talked to plaintiff about his refusal to work in the picture; also that he still had hopes of getting his principal to do the picture, and promised to communicate later with Speers. Because of such promise the latter claimed he had delayed sending the telegrams until late on April 10th.

At this point, it should be noted that while both [264] Kelley and Ward testified that early in April, 1943, Speers had reported having held a telephone conversation with plaintiff, in substance as described by him on the witness stand neither of said witnesses corroborated his testimony to the effect that he reported having had a prior conference with plaintiff wherein the latter allegedly asserted that he was seriously thinking of going into the Civil Air Patrol, or otherwise made any reference to engaging in military service. Likewise, there is an absence of corroboration of Speers' testimony to the effect that following his last telephone conversation with plaintiff the latter's agent promised to communicate with the former relative to getting plaintiff to do the picture.

In this same connection it is appropriate to consider a certain affidavit, verified by Speers on October 21, 1943, and filed in support of defendant's application for an injunction pendente lite herein. This affidavit purports to set forth important parts of the discussion had between plaintiff and Speers at the latter's office in April, 1943, and also calls attention to what plaintiff allegedly told him over the telephone about two days later. It is significant that in said affidavit, although Speers does aver that during the office conference plaintiff told him "that

he was considering refusing to render his services in said photoplay ("Fired Wife") for the principal reason that the director selected for said photoplay did not meet with his approval and also because he was thinking of signing up with the 'Service' for the duration of the war," and while he does further assert that in the subsequent telephone conversation plaintiff stated that "he had decided not to render the services requested of him by Universal and would not appear at the studios of Universal to portray the said role" (of Hank), Speers does not [265] allege therein either in words or in substance that plaintiff told him that he had signed up or was going to sign up for the duration of the war with the Civil Air Patrol or some other military service, and that he would not do any more pictures for the duration, or that plaintiff made any similar statement in whole or in part. (Under-scoring ours.)

In addition, Muhl testified that prior to April 10th he was informed, first by Ward and later by Speers, to the effect that plaintiff would not portray the role of Hank and that defendant would receive no more of his services for the duration of the war, because he was signing up with the Civil Air Patrol or some other organization connected with the Army Air Corps.

Likewise this witness and also Kelley asserted that they believed and relied upon such information, and when it was learned that plaintiff had failed to report at the studio on April 12th, and upon being advised by the Contract Department that it would be lawful to suspend plaintiff for the duration of the war, instructions were issued to that effect and accordingly defendant suspended

plaintiff on that date for the duration of the war and stopped his compensation for the same period. (Under-scoring ours.)

Reading from a memorandum, which he explained had been dictated by him a few minutes after the conversation referred to therein had taken place, Muhl testified that on April 13th in a telephone conversation had with Oscar Cummins on that day, he informed the latter that following plaintiff's statement to Speers over the telephone that he was in the Civil Air Patrol for the duration and would not report for his role in the photoplay "Fired Wife," defendant had wired plaintiff to report on April 12th to Kelley; that he failed to do so, and to establish a clear position, defendant [266] intended to suspend him from the payroll as of that date; also, that plaintiff's agent replied that such action was proper, that he was sick at the situation, also that he had talked to plaintiff the preceding night and was trying to get him to come in for a further discussion with Speers and Muhl; also that Muhl stated that defendant would recast the role, to which said agent replied he understood defendant would have to do this, but he didn't think the situation was fair to plaintiff or to the studio or to plaintiff's country and he would like to straighten it out.

On the other hand, plaintiff's agent has testified that at no time when conversing with Muhl or Speers or any other employee of defendant did he state that plaintiff was unavailable for the duration of the war because he had joined the Civil Air Patrol, or any branch of the Air Forces, or for any other reason, and that on none of these occasions was any reference made respecting what service plaintiff would render for the Civil Air Patrol. He has further denied that in any such conversation there was

any mention made to the effect that a wire had been sent to plaintiff to report at defendant's studio, or that he expressed approval of defendant's action suspending plaintiff, although said witness conceded defendant was entitled under the contract to suspend him for the period required by a substitute to portray the role of Hank.

As admitted by the pleadings, on April 15th defendant served upon plaintiff a notice, the body of which read as follows:

"This is to notify you that by reason of your failure, refusal or neglect to perform your obligations under your contract of employment with us dated November 21, 1938, as hereto- [267] fore amended, and particularly by reason of your failure, refusal or neglect to report to us on April 12, 1943 in accordance with our notice to you dated April 10, 1943, we elect to and do hereby exercise the right granted us under the provisions of paragraph 12 of said contract to refuse to pay you any compensation during the period of such failure, refusal or neglect.

"At the time of such failure, refusal or neglect you were cast to portray a role in a photoplay, to wit: the role of 'Hank' in the photoplay now entitled 'Fired Wife.' By reason of your failure, refusal or neglect, we are engaging another person to portray such role. We accordingly elect to and do hereby exercise the further right granted us under the provisions of said paragraph 12 of said contract to refuse to pay you any compensation until the completion of such role by such other person.

"This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us." (Underscoring ours.)

Upon May 18, 1943, defendant served upon plaintiff an additional notice, the body of which read as follows:

"Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks and two (2) days [268] commencing April 12, 1943. This is to notify you that we have elected and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

"Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

"This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us."

On Wednesday, May 26th, according to the testimony of plaintiff's agent, also that of the latter's secretary, also that of plaintiff's former chauffeur, each of these individuals requested the delivery of the weekly salary check for plaintiff, that in each instance an employee of defendant, either in the paymaster's office or in the cashier's department, replied in substance that plaintiff was under suspension and therefore no salary check was ready.

It further appears from the testimony of Kelley that on May 28th he had a telephone conversation with a Mr. Ben Thau, a producer for Metro-Goldwyn-Mayer Studio, relative to the subject of that studio employing plaintiff to do a picture for it. Reading from a memorandum alleged to have been prepared by his secretary from stenographic notes made by her [269] upon said occasion, he testified, in substance, that Thau informed him that Metro-Goldwyn-Mayer desired to employ plaintiff to portray a role in a photoplay it was proposing to produce; that Kelley replied that Cummings was on suspension, "he just refused to do a picture over here," that it was "one of those things again, he said he would rather do pictures on the outside"; that Thau added, "We have a great part here"; whereupon Kelley retorted, "We wouldn't let him go on the outside; if we did that, he would never do a picture here; he claims he can't do a picture on account of being in the army"; that thereupon Thau commented "We could use him here" to which this witness answered, "we can't do that; he is under suspension": that this conversation continued in a similar vein, Kelley adding that defendant then had a picture into which it could put plaintiff, also that the latter had worked

in the Boyer picture and was all set to do another," that everything was fine and he was tickled to death, and two days before the picture was to start he called and said he couldn't work and was going into the Civil Air Patrol, so that's the situation." (Underscoring ours.)

According to Muhl, on May 28th the latter and Oscar Cummins held a telephone conversation, a memorandum of which was allegedly dictated by him a few minutes later. Reading from said memorandum Muhl testified that upon said occasion he told plaintiff's agent he had heard a rumor that Metro was interested in plaintiff and inquired whether he knew anything about it; that Cummins answered in the negative and further stated that P. R. C., a producing organization, called him to ask about plaintiff's availability and that he advised them that plaintiff was engaged in work connected with establishing an air shuttle service, and that anybody wanting him would have to see General Arnold of the Army Air Corps; and that the [270] witness asked Cummins if anybody had suggested to Metro that plaintiff's suspension had been terminated or that he was free either from his contract with defendant or to work with anybody else, and that plaintiff's agent replied he was positive there was nothing like it.

On the other hand, the latter denies having talked with Muhl on May 28th, or having had a similar conversation at any other time, except he does admit that on a much earlier date, and during the course of a conversation wherein they talked about changing some of the terms of plaintiff's contract and thereby adjusting the then existing controversy, Cummins mentioned that P. R. C., a producing organization, had inquired whether plaintiff would be available to work in a picture it intended to produce.

compensation under said contract was payable to me), at or about 2:30 p. m., demand was made upon you for the payment of the compensation due and payable on said date. At said time, you failed and refused to pay me the compensation which was due and payable under said contract. Such failure and refusal was a material breach by you of your obligations under said contract and I hereby notify you that I elect to and do hereby terminate said contract by reason of such failure and refusal.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which I may have in the premises, all such other rights and/or remedies being expressly reserved by me." (Underscoring ours.)

"ROBERT CUMMINGS."

The other notice was on the letterhead of defendant, was dated June 2, 1943, and read as follows: [272]

Registered Mail

"Mr. Robert Cummings
c/o Oscar Cummins
9441 Wilshire Boulevard
Beverly Hills, California

Dear Mr. Cummings:

This is to acknowledge receipt of your telegram of June 1, 1943.

Please be advised that despite your purported termination of your contract with us, dated November 21, 1938, we will continue to treat and consider said contract as being in full force and effect.

In our notice to you under date of May 18, 1943, we notified you that your employment under said contract, as amended, would be further suspended during the continuance of your failure, refusal and/or neglect to perform your obligations thereunder.

At no time since April 12, 1943, up to and including the present time, have you notified us of your willingness to perform pursuant to the terms of said contract, as amended. If you are willing to resume your services under said contract, as amended, please notify Mr. Muhl at our studio, and upon your reporting pursuant to such notification, we will terminate the suspension of your employment. Failing such notification by you, your employment will continue in suspension during the continuance of your present failure, refusal and/or neglect to perform your obligations under said contract, as amended, and until you do report ready to resume [273] and perform your services under said contract, as amended.

We reserve the right to extend your employment under said contract, as amended, for a period equivalent to the period of such suspension, and this notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

Edward Muhl

By Edward Muhl

jab/j

Assistant Secretary"

It was further stipulated that since May 29, 1943 there had been an interchange of notices and letters from defendant to plaintiff and from the latter to the former, the purport of which is that defendant claims the contract still exists between them, whereas plaintiff claims that by reason of defendant's material breach thereof the contract has been terminated by him as of May 29, 1943. Likewise, the parties have admitted that all written notices, copies of which are appended to any of the pleadings and plaintiff's affidavit filed in connection with the motion for summary judgment, etc., may be considered authentic and as having been sent and received, as the case may be, by the parties therein designated, and also that since the commencement of the instant suit defendant has sent and plaintiff has received two other notices, dated, respectively, November 15, 1943, and December 20, 1943. Each of these notices was worded similar to that of May 18, 1943, except that the period of suspension specified in the [274] one dated November 15th consisted of five weeks commencing October 11, 1943, while the period of suspension in the other was specified as five weeks commencing November 16, 1943.

On June 3rd plaintiff's agent telephone to Muhl and requested an appointment for the purpose of endeavoring to adjust the then existing difficulty between plaintiff and defendant.

Reading from a memorandum alleged to be a transcript of the stenographic notes made upon said occasion by his secretary, Muhl testified that in the course of that telephone conversation Cummins asserted he wanted to discuss this matter privately and if there be any hope to work anything out he would like to do it, and that to

this remark Muhl replied that since the matter was in a formal phase and as long as the status thereof was that of a clinch, their talk could not be completely private and confidential, and that he suggested plaintiff's agent contact him further about the middle of that afternoon.

Subsequently and on the same day Cummins and Muhl conferred in the latter's office, Ward also being present. Again refreshing his recollection from a memorandum alleged to have been dictated by him within a few moments after the conclusion of their talk, Muhl testified that during the course of said conference plaintiff's agent asserted that when he had talked to the latter over the telephone the preceding week, he had known nothing about the position being taken by plaintiff; also that the situation between the latter and defendant had been reviewed by himself, his brother and a former Justice of the California Supreme Court and they had decided defendant had breached the contract, outlining his reasons for such conclusion, and also stating he wanted to [275] avoid litigation, if possible; that he further claimed demand for plaintiff's compensation had been made on May 26th by two persons, but that no check for the same had been obtained; and that a similar request had been made upon defendant's treasurer, who answered that there was no check for plaintiff since he was on suspension. During that same conference, according to Muhl, the latter stated that defendant also desired to avoid litigation and he denied that it had breached the contract; also that Cummins outlined a proposition for modifying the terms of the contract, which proposal Muhl informed him could not be entertained; that in addition the latter told him there had been a deliberate effort to entrap defendant in a legal situation to the end that plaintiff would be relieved

of his responsibilities under the contract, but that he did not accuse Cummins of this since the latter had assured Muhl he did not know of plaintiff's plan.

Cummins, however, denies that during the aforementioned conference he stated that when he talked with Muhl the previous week he had known nothing about the position being taken by plaintiff, or that the situation between plaintiff and defendant had been reviewed by a former Justice of the California Supreme Court, or any other Judge, and further denies that any accusation was made as to an effort to entrap defendant.

It is significant that in a certain affidavit, verified by Muhl on November 3, 1943, and filed in support of defendant's application for an injunction pendente lite herein, he asserted that the telephone conversation which on the witness stand he specified as having occurred on May 28th took place on March 28th, 1943. Likewise, in the same affidavit, although it is averred therein that at all times [276] since plaintiff's suspension, defendant has understood and believed he would not and did not intend to render services for it, or otherwise was willing to resume his obligations under the contract between them, nowhere in said document is there any statement to the effect that plaintiff had represented, or that Muhl had been informed he had represented that he would devote 100% of his time to the war effort, or that he had signed up for the duration of the war with the Civil Air Patrol, or any other military service, or that he would not work in pictures for the duration of the war.

In this same connection, it should also be noted that between April 13th and May 28th Muhl and plaintiff's

agent had, according to the former, at least two and possibly three, and according to the latter, perhaps six, conversations, in each of which they talked about suggestions made by Cummins to the effect that plaintiff's employment be arranged on a different basis, also that one of these suggestions was that plaintiff be released from working exclusively for defendant, that, instead, he should do one or two pictures a year for the latter, reserving the right to work for some other studio, and likewise that he was thinking of going into government work and desired or expected to devote part of his time to government service.

It should further be observed that, according to Muhl, either in the latter part of April or fore part of May, 1943, he had a conversation with a Mr. Prinzmetal of Metro-Goldwyn-Mayer Studio and that upon said occasion the latter inquired as to what position defendant would take in the event Metro-Goldwyn-Mayer could get plaintiff to do a picture for them and also suggested if this could be accomplished it might prove a way of solving the difficulty then existing between plaintiff and defendant. Yet at no time during that dis- [277] cussion did Muhl assert or even suggest that plaintiff had arranged, or had represented that he had arranged, to devote all of his time for the duration of the war to some military service of the United States and therefore it would be impossible to get him to do a picture, or that therefore it was useless to discuss such a proposition.

Likewise, it is pertinent to point out that during the various conversations had subsequently to April 10th be-

tween Muhl and plaintiff's agent—the former admits there were at least six, while the latter claims there were several more—there was not a single instance when Muhl took the definite, unequivocal position of declining, upon the ground that plaintiff theretofore had undertaken to devote 100% of his time to some government service, to discuss the subject of modifying the terms of plaintiff's contract whereby the latter would be allowed to make less pictures for defendant and be enabled to make some pictures for others. Indeed, according to Muhl, in only two of these conversations was any reference made to the matter of plaintiff being, or of his becoming, connected with the Civil Air Patrol, or any other military service.

Again, it is significant that in the conversation had between Kelley and Thau of Metro-Goldwyn-Mayer the former likewise did not take a definite, unequivocal stand, namely, refuse to discuss the matter of another studio employing plaintiff to do a picture upon the ground that the latter had become connected with some military service for the duration of the war, devoting all of his time to the same, or even that he had so represented, and hence it would be useless to discuss the subject. On the contrary, upon said occasion, according to Kelley, the latter stated to Thau "It is one of those things again; he said he would rather do pictures on [278] the outside." (Underscoring ours.)

At least two of defendant's executives—Speers and Muhl—stated that for some months prior to April, 1943, they had known about plaintiff being in the Civil Air

Patrol, also acknowledged having seen him in the uniform of the latter organization upon at least one occasion, and further admitted that during said period each had held conversations with him wherein he had related some of his experiences with the patrol, also had explained his status therein, what he was doing in it, and that he had disclosed he could resign therefrom at any time.

According to plaintiff,—his testimony on this point stands uncontradicted—he joined the Civil Air Patrol in the early part of 1942 but has never signed up for or gone into active service with that organization. Likewise, in the aforementioned affidavit made by Muhl, the latter averred, among other matters, the following:

“A letter date July 6, 1943, written over the signature of 1st Lt. J. W. Gilges, an intelligence officer attached to the Seventh Army Air Force Flying Training Detachment at Oxnard, California, requesting certain information regarding Cummings, was received by Universal. From the contents of this letter we had reason to believe and still believe that Robert Cummings applied for enlistment in some capacity in the Army Air Forces. The Los Angeles Times carried a news item dated July 17, 1943, that Cummings’ now is serving as an instructor for the Army Air Force cadets at the Mira Loma Flight Academy Cummings was sworn into the Air Force Reserve this week and had been assigned to his first class of cadets.” [279]

In addition, the entries kept in the log covering plaintiff’s airplane operations for the Civil Air Patrol disclose that he made numerous trips for that service between

the latter part of May, 1942, and the corresponding period in 1943. On each of these trips he flew beyond Los Angeles County, and on most of them he flew to points beyond this state. Two of these trips were made on May 23rd and 24th, respectively; another, on August 16th, still another on September 12th, two were made on Sept. 13th; there were three on September 14th, also two on October 11th, another on October 12th, still another on October 30th, also two on October 31st and four were made on November 1st; there was one trip on each of the days of November 6th, 7th, 8th, 16th and 20th to 30th, inclusive, also one trip on each of the days of December 1st, 2nd and 3rd; there were two trips on each of the days of December 4th, 5th and 6th; a single trip on each of the days of December 7th, 8th, 9th, 11th, 13th to 18th, inclusive, also a single trip on December 27th, another on December 28th; two trips on December 29th and a single trip on December 30th, all in the year 1942. Again, in the year 1943 he made one such trip on each of the days of January 3rd, 6th and 9th, also two trips on January 10th, one trip on each of the days of January 11th, 12th, 13th, and 15th, also two trips on January 16th, another trip on January 17th, still another on January 18th, and two trips on the 19th of that month. On March 28th, he flew on two trips; again, on April 11th he made four trips, and on the 22nd of the same month he made another trip. He made one trip on May 7th, two trips on May 8th, also one trip on each of the days of May 9th, 10th, 19th and 20th, likewise, two trips on May 21st and again on May 22nd, also three trips on May 23rd, a single trip on each of the days of May 24th, 25th and 27th, and two addi- [280] tional trips on May 28th.

In view of these log entries, also the admissions on the part of Speers and Muhl, respecting their knowledge

for a period of months prior to April, 1943, concerning plaintiff's affiliation with and participation in the operations of the Civil Air Patrol, and taking into consideration plaintiff's uncontradicted testimony upon the same subject, it is quite likely that plaintiff was continuously absent from Los Angeles County during several distinct and separate periods between September 13, 1942, and May 28, 1943. Likewise, it is altogether improbable that such executives as Speers, Muhl and Kelley among defendant's officials were ignorant of those facts. Rather does the evidence persuasively warrant the inference that these officials recognized such activities on the part of plaintiff as being in furtherance and in support of the war effort and accordingly approved the same. So far as the record discloses, prior to April 10, 1943, defendant had had no difficulty in contacting plaintiff 'whenever necessary, either directly or through his designated agent.

The contract, in paragraph 15 thereof, provides, in part, that: "All notices which the producer (defendant) is required or may desire to serve upon the artist (plaintiff) under or in connection with this agreement may be served by addressing the same to the artist at such address as may be designated from time to time in writing by the artist * * * * * and, in any case, * * * * *
by sending the same, so addressed, by telegraph, * * * * *. If the producer elect * * * * * to send the same by telegraph * * * * *, then the date * * * * * of delivery thereof to the telegraph or cable office, as the case may be, shall be the date of the service of such notice."

It is undisputed that on or about November 27, 1941, [281] plaintiff, in writing, advised defendant that

all written notices which the latter was required or might desire to serve upon him or in connection with said contract be addressed to him "care of Oscar Cummins, 8511 Sunset Boulevard, Los Angeles, California," and that said designation was furnished to defendant upon one of its forms provided for such purpose. Likewise, it was shown that the last mentioned address had been the business address of both plaintiff and his agent until about the end of May, 1942, at which time plaintiff's agent removed to Suite 527 California Bank Building, Beverly Hills, California, and simultaneously plaintiff's business address was established at the same place where it remained until after the commencement of the present litigation. In view of the various telephone messages exchanged and the conferences had between plaintiff and one or more of defendant's executives prior to April 10, 1943, and also the many telephone messages exchanged and the conferences had between plaintiff's agent and one or more of defendant's executives, some of which were held prior and the remainder subsequent to that date, it is reasonable to conclude that defendant had no difficulty contacting plaintiff through his agent.

It is not disputed that plaintiff informed Speers he would not appear in the picture "Fired Wife"; likewise that he did not portray any role therein, nor did he report at defendant's studio on or after April 12, 1943; that, subsequent to the last mentioned date, defendant proceeded with the production of said picture, employing a substitute to portray the role of Hank, and that the same was completed on May 19th of that year.

At the trial it was also stipulated that under the contract plaintiff became entitled to compensation on May [282] 26, 1943, at the rate of \$250.00 per day for three days of the week, ending May 22nd, and that subsequently he became entitled to additional compensation at the same rate for the week ending May 29th, unless the Court should decide that defendant was entitled to suspend him at all times from and after May 20th, as it undertook to do. Likewise it was stipulated that defendant failed to pay any salary to plaintiff on May 26th, 1943, also that no salary has been paid to him since said date by defendant or on its behalf; and that at all times mentioned in any of the pleadings Oscar Cummins was plaintiff's agent and representative and duly authorized to talk and act in all matters in which he purported to, or did, talk or act. It was further stipulated that no written demand was made by defendant at any time after April 10, 1943 (other than the telegram of April 10, 1943) that plaintiff report to defendant in connection with any picture other than "Fired Wife," or for any services pursuant to said contract.

The contract involved herein provides, in part:

"2. The artist (plaintiff) agrees that * * * * * he will render the services hereinafter specified, * * * * *; that he will render his services as an actor in such roles and in such photoplays and/or other productions as the producer may designate; that he will make personal appearances in motion pictures theatres and/or other places of entertainment and/or will render his services as an actor in vaudeville, plays and/or in all other kinds of performances

on the speaking stage; that he will render his services as a radio performer, not only by broadcasting in person, but also by making electrical transcriptions and/or by any other present or future methods or means; that he will render his services as an actor in television [283] productions; and that he will render his services in connection with the broadcasting and/or transmission of his likeness and/or voice by means of television, radio, and/or otherwise, whether such broadcasting and/or transmission be either directly or indirectly in connection with or independent of photoplays. The artist further agrees that he will promptly and faithfully comply with all reasonable instructions, directions, requests, rules and regulations made or issued by the producer (defendant) in connection with the services to be performed by the artist hereunder; and that he will perform and render his services hereunder conscientiously and to the full limit of his ability and as instructed by the producer at all times and wherever required or desired by the producer."

"12. * * * * * in the event of the failure, refusal or neglect of the artist to perform or observe any of his obligations hereunder * * * * * as instructed, the producer, at its option, * * * * * may refuse to pay the artist any compensation during the period of such failure, refusal or neglect on the part of the artist, and shall likewise have the right to extend the term of this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues. If, at the time of such failure, refusal or neglect, the artist shall have been cast to portray a role in a photoplay, or shall have been

directed to render any other of his required services hereunder, then and in either of said events, the producer shall have the right to refuse to pay the artist any com- [284] pensation during the time which would have been reasonably required to complete the portrayal of said role and/or to render such other services, or (should another person be engaged to portray such role or to render such other services) until the completion of such role or such other services by such other person; and in any or either of such events the producer shall also have the right to extend the term of this agreement and all of its provisions for a like period of time, or for any portion thereof. Should the producer notify the artist that the artist has been cast to portray a role in a photoplay or to perform any other of his required services hereunder, and should the artist thereupon or at any time prior to the designated date of commencement of the rendition of such services, advise the producer that the artist does not intend to render such services, the producer shall thereupon, or at any time thereafter, have the right to refuse to pay the artist any compensation commencing as of the date on which the artist has so advised the producer of his intent not to perform, or, at the producer's election, as of any time thereafter, and continuing until the expiration of the time which would have been reasonably required to complete the portrayal of said role and/or to render such other services, or (should another person be engaged to portray such role or to render such other services) until the completion of such role or of such other services by such other person; and in any or either of such events the producer shall also have the right to extend the term

of this agreement and all [285] of its provisions for a like period of time or for any portion thereof. * * * * * Each and all of the several rights, remedies and options of the producer contained in this agreement shall be construed as cumulative and no one of them as exclusive of the others or of any right or priority allowed by law."

"13. If this agreement be suspended, or if the producer refuse to pay the artist compensation, pursuant to any right to do so herein granted to the producer, * * * * * if in connection with such suspension, refusal to pay * * * * *, the producer shall exercise the right to extend this agreement for a period equivalent to all or any part of the period of such suspension, refusal to pay * * * * *, then and in that event the running of the then current term or period of the artist's employment hereunder shall be deemed to be interrupted during the period of such suspension, refusal to pay * * * * *, but shall be resumed immediately upon the expiration of such suspension or * * * * * (in case of any such refusal to pay) upon the resumption of the payment of compensation, and * * * * * shall continue from and after the date of such resumption for a period equal to the unexpired portion of such term or period at the time of the commencement of such suspension, refusal to pay * * * * *, less a period equal to that portion, if any, of the period of such suspension, refusal to pay * * * * *, for which the producer does not exercise the right to extend this agreement."

"14. No waiver by the producer of any breach of any covenant or provision of this agreement shall [286] be deemed to be a waiver of any pre-

ceding or succeeding breach of the same or any other covenant or provision.”

“19. The artist expressly agrees that until the expiration of the term hereof he will be available at all times in Los Angeles, California, or at any other place the producer may designate, unless excused in writing by the producer. The artist further agrees that if and when requested by the producer to do so, he will report at the producer’s studio, or at any other place the producer may designate, for wardrobe fittings, publicity interviews, publicity photograph sittings, making tests and/or ‘stills,’ and for such discussions as the producer may deem necessary or desirable; it being understood, however, that no compensation whatsoever shall be or become payable to the artist for the compliance by the artist with such requests of the producer.”

One additional aspect of the evidence remains to be noted. As conceded by defense counsel during the oral argument had at the close of the trial, plaintiff’s version concerning what was said during the lengthy conference at Speer’s office in the early part of April, 1943, and also his account of what they said during the telephone conversation which followed perhaps two days later, was corroborated in substance by the testimony of Speers except in the following important particular. The latter testified in effect that during said telephone conversation plaintiff represented that he had signed up for the duration of the war with the Civil Air Patrol, or some other military service, also that he had decided to devote 100% of his time to the war effort, and therefore would not work in pictures.

On the other hand, plaintiff has denied making any [287] such statement either in whole or in part.

It is upon the record we have thus outlined that the issues raised herein must be determined.

As previously observed, defendant contends that by its telegraphic notice of April 10th, 1943, it instructed plaintiff to report at its studio to perform two separate and distinct obligations, each of which was included among those he had agreed to perform under his contract. In this connection it is argued that by said notice he was called upon, firstly, for the rendition of his services in connection with the portrayal of a role in the photoplay "Fired Wife," and secondly, for the rendition of such other services as defendant might require under the contract. Accordingly defendant takes the position that by his failure to report at its studio on April 12, 1943, plaintiff breached the contract in the two respects above mentioned.

Plaintiff concedes that his failure and refusal to portray the role of Hank in the picture "Fired Wife" constituted a breach of the contract, and that such breach continued from the 12th of April to and including the 19th of the following month, at which time the substitute "engaged to portray such role" by defendant completed the same. However, he insists that he had not "been directed to render any other of his required services" under the contract. He further points out that the evidence convincingly shows that neither at the time the aforementioned notice was sent nor on April 12th did defendant intend to direct him to render any of the other specific services which under the contract he had agreed to perform. Hence it is argued that when, following plaintiff's failure and refusal to report at the studio and portray the aforementioned role, defendant

elected to and did exercise the right to engage another person to portray [288] such role, it had "the right to refuse to pay the artist (plaintiff) any compensation," according to the terms of the contract, not for an indefinite period, but only "until the completion of such role" by the substitute. In other words, defendant's right to refuse to pay plaintiff any compensation terminated at midnight on May 19th, and he was entitled to have his suspension from the pay roll terminated at the same time.

It is true that one of defendant's executives, Daniel Kelley, testified to the effect that shortly prior to April 10, 1943, Speers had informed him that plaintiff had stated he would not play the role of Hank and had signed up to render his services exclusively for the Civilian Air Patrol for the duration of the war, and thereupon Kelley suggested either to Muhl or Ward that a wire be sent to plaintiff to ascertain whether it was true that he was not going to be able to do any more pictures for the duration of the war. According to this witness he wanted plaintiff at his office on April 12th to find out from him personally whether his objection was the role or because of his going into the Civil Air Patrol and if the latter, whether he would be unable to do any more pictures for the duration of the war, in which event defendant would have to plan for some other personality for the remaining pictures it had figured for plaintiff. However, this witness acknowledged that the notice of April 10th was neither prepared by nor submitted to him, and further that defendant had no intention of directing plaintiff to perform any services at that time other than to portray the role of Hank.

In considering the issues here raised we shall find it illuminating to refer to certain portions of the oral ar-

gument made in support of defendant's application for an in- [289] junction pendente lite. At that hearing it was conceded that the construction placed upon the contract by the parties, as evidenced by the practice which they had followed, was in substance that from time to time defendant produced certain pictures in each of which plaintiff was assigned to portray a particular role, that he was required to attend at the studio or wherever the picture was being produced, not daily, but only on such days as the producer needed his presence, and that plaintiff was paid compensation, not only during the times that he worked in pictures, but also during periods when he was not so engaged, and even when he was not present at the studio.

During the argument the Court called attention to the wording of defendant's notice of April 15, 1943, in which it advised plaintiff that particularly by reason of his failure to report to defendant on April 12th in accordance with its notice of April 10th, it elected to and did exercise the right to refuse to pay him any compensation, during the period of such failure, also that at the time of such failure he was cast to portray a certain role in a photoplay, that by reason of his failure it was engaging another person to portray such role, and that it elected to and did exercise the further right granted defendant under the provisions of Paragraph 12 of the contract to refuse to pay him any compensation until the completion of such role by such other person. This notice concluded with a reservation of all other rights and/or remedies.

The Court further pointed out that by its next notice dated May 18th, in the first paragraph thereof, defendant claimed it had suspended plaintiff by reason of his refusal to portray said role and also advised plaintiff that

it had elected to extend the term of his employment for the period of such suspension. Reference was then made to the second para- [290] graph of said notice which read: "Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period." This document likewise concluded with a reservation of all other rights and/or remedies.

Thereupon the Court commented in substance that in view of the construction of the contract which the parties had placed thereon by the practice they had followed, it would appear that if defendant desired plaintiff to portray a role in a photoplay (other than "Fired Wife") or to perform any other service, plaintiff was entitled to be so advised by some new or further call to that effect on the part of defendant. "How was he to know," inquired the Court at that time, "under this contract and the construction which the parties themselves gave to it, when his services were further needed unless he heard from the employer?"

To this, counsel then representing defendant responded: "*****, I don't think he would know when his services were needed, so far as acting in productions or reporting for tests or stills are concerned, but that is not the event which gives him his right to compensation. In other words, ***** he is entitled to compensation even though in a particular week or series of weeks he may not be near the studio. So that the fact that he will not know until he is notified that there is a production isn't the event which gives rise to his right to pay. ***** Certainly where a man refuses to play a role

in a picture there is reason to believe, in the normal course of human events, that there is going to be trouble with this particular man. That is some- [291] thing that is perfectly plain. In other words, there has been some kind of an argument between the artist on the one hand and the studio on the other, which has resulted in the refusal of this man to play a role. Now, the question is, what is the future going to bring? The studio sends him notice, 'we are going to put you on suspension during your present failure, refusal or neglect to perform your obligations under your contract'."

Whereupon the Court inquired, "What other obligations was he called upon to perform which he refused to discharge?"

Counsel's reply was: "Well, so far as the particular case giving rise to this is concerned, it was simply the refusal to play this role; * * * * *. But the important thing, as I see it, is his failure to comply with his obligations under the contract, and whether those obligations relate to the playing of a particular role, or whether they relate to any other obligation under the contract, does not affect the length of time during which he is to be put on suspension, because in either event the length of time is the continuance of his refusal and neglect to perform."

The Court next asked: "And what I am trying to find out is, to perform what?"

To this, counsel responded: "To perform whatever obligations he has under the contract."

Whereupon, the Court observed: "Again, it isn't clear to me which of the obligations, which under this contract he promised to perform, does the record disclose he failed to discharge?"

Defense counsel's reply was: "* * * * * the particular cause for suspension was his failure to portray this particular role, then he was put on suspension. In other words, his particular refusal was to portray a particular [292] ular role. But what I am trying to suggest to the Court is that that is simply the essence in which he refused to perform his contract; * * * * * suppose under the contract the artist was obliged to appear on a radio show at a particular time upon request of the studio and he refused to do it. He said, 'I don't want to do it,' and he does not appear. The studio under this contract, I take it, could suspend him, even though the suspension notice might go out after the date when he was supposed to have gone on the radio. Then it would be up to the plaintiff, or to the defendant, as the case may be,—I mean the artist—to say, 'Well, I have repented. I am ready to go back to work. Please lift my suspension.' In other words, the actual time it takes to do the act for which the suspension is made does not determine the length of the suspension."

Following some further discussion between the attorneys, defense counsel concluded by stating. "The question I was trying to suggest, in answer to your Honor's question, 'When would the artist know when the studio wanted him?' was, when did the studio know when the artist was going to come back and be a good boy, unless he told them so? In other words, is the interpretation to be urged here that where an artist has committed a material breach and the minimum period has expired, namely, when they have gotten a substitute, that irrespective of any manifestation of willingness on the part of the artist to come back to work and to be a good boy, the studio must *them* immediately put him on the payroll and continue paying him for weeks or months,

maybe, before they even get a new role for him, without having any idea whether he is ever going to come back to work? That is the other side of the question with which we are concerned."

Thus, at the hearing of its application for an injunction pendente lite, defendant took the position in effect [293] that by reason of plaintiff's refusal to report at its studio on April 12th, and although it subsequently had employed another person to portray the role which he then declined to fill, and although the portrayal of such role had been completed by the substitute on May 19th, nevertheless, it was entitled to continue thereafter to refuse to pay him compensation, and to continue to extend the term of his contract, unless and until he should advise it that he was willing to perform his obligations under the contract. Carried to its logical conclusion, such contention could lead to a situation whereby defendant would secure control over plaintiff's services, not for the maximum period expressly limited by statute in California, to-wit, seven years, but for a much longer period, and perhaps for the balance of his natural life—a result obviously violative of public policy. Accordingly, this contention cannot be upheld.

The evidence introduced at the trial established without contradiction that where the existing circumstances were such as to afford no reason to believe or anticipate any difficulty, and it was desired to have the artist report at the studio, the practice usually followed was to telephone to him or his regularly designated agent requesting the artist to report accordingly, but that if the circumstances were otherwise and there was reason to believe the artist would not respond the notice was communicated in writing. Likewise, as heretofore pointed out, upon

plaintiff's failure and refusal to report at the studio on April 12th, and as the result of conferences had between several of its executives, including Muhl, Kelley, Speers and Ward, defendant suspended plaintiff from its payroll, not for the limited period required by the substitute it employed to portray the role he then declined to fill, or for any other limited time, but for an indefinite [294] and unknown period, to-wit. for the duration of the war. However, in none of the notices which it caused to be served upon plaintiff did defendant disclose that fact.

Defendant justifies its adoption of this extreme course upon the ground that plaintiff, according to its executive Robert Speers, informed the latter he would not work in the aforementioned picture because he felt it was his duty to give 100% of his time to war work, and therefore was signing up with the Civil Air Patrol for the duration of the war. In the course of the oral argument at the close of the trial defense counsel stated: "Now there is of course a very decided conflict in the evidence with respect to what was said both on April 3rd and April 5th. The plaintiff denies that he said that he was going into the Civil Air Patrol, or the Army, for the duration on April 3rd. I think that is the only real controversy with respect to that conversation. Generally speaking, the parties, that is, Bob Speers and Bob Cummings, agree on the general substance of that conversation. Then we come, of course, to the more important conversation of April 5th on the telephone. In that respect, Bob Speers, refreshing his recollection from the memorandum made three months later, said that the following Monday he had a telephone conversation with Robert Cummings in which he stated that he had made up his mind not to do the picture because he felt that it was his duty to give 100% of his time to war work and therefore was sign-

ing up with the Civil Air Patrol for the duration. Here again we have a direct conflict in the evidence. To my mind, the credibility of Bob Speers is an important issue in the case because everything flows from that conversation of April 5th. If Robert Cummings didn't make that statement our affirmative defense of estoppel goes right out of the window." [295]

We have heretofore pointed out several important portions of the evidence which cast serious doubt as to the accuracy of Speer's version concerning what was said between plaintiff and himself on this subject. Likewise, as previously noted, there were repeated instances, subsequent to April 12th and prior to May 29th, when at least one of defendant's executives engaged in a discussion in which it was proposed, either on behalf of plaintiff or at the suggestion of another that his contract be modified to the extent of permitting him to work in pictures for others as well as for defendant, most of these conversations having been held with plaintiff's agent, while two of them were had with an executive of another studio.

Again in its notice of April 15th defendant called particular attention to its claim that plaintiff had breached the contract in failing or refusing to report at the studio at a time when he was cast to portray a role in a certain photoplay, also pointed out that by reason of such failure or refusal it was engaging another person to portray such role, and further advised that it elected to and did exercise the right to refuse to pay him any compensation until the completion of such role by the substitute. However, while said notice unequivocally set forth defendant's position in the particulars just stated, the same failed to disclose that there was some other service or obligation which defendant was still calling upon plaintiff to perform at the studio.

Defendant's notice of May 18th was similar in character and placed emphasis upon the fact that by reason of his failure, refusal and/or neglect to perform his obligations under the contract plaintiff's employment had been suspended for a period of five weeks and two days commencing April 12th (the same being the time required by the substitute to portray the role of Hank) and accordingly that it elected to and did [296] exercise the right to extend the term of his employment for an equivalent period.

Plaintiff's notice of May 29, 1943, is equally significant. By that document plaintiff called attention to the essence of defendant's notice of May 18th, also stated his position to the effect that there had been no failure, refusal and/or neglect to perform his obligations under the contract since the expiration of the aforementioned period of five weeks and two days, which ended on May 18th, and that compensation for the period subsequent to the latter date became payable to him on May 26th and further claimed that on the last mentioned date demand for the payment thereof was made, but that defendant refused to pay the same, and that accordingly, by reason of such refusal, he elected to and did terminate the contract. It is altogether unlikely that in said notice plaintiff would have alleged that three days previously demand had been made for payment of his compensation and that payment thereof had been refused, unless such occurrence had actually taken place.

Thus the evidence established quite convincingly that between April 13th and May 28, 1943, plaintiff pursued a course of conduct consistent with a purpose on his part to continue working in motion pictures, rather than to suspend such work during the war, and that repeatedly knowledge to that effect was brought home to the defend-

ant, coupled with further information that he preferred to do pictures for others, in addition to making them for defendant, rather than exclusively for the latter. Under such circumstances, and in the face of the record heretofore outlined, it would be unreasonable to conclude that plaintiff had determined he would make no more pictures for the duration of the war, or that he had made a representation to that effect to the defendant. [297]

Rather does the evidence support the view that by the early part of April, 1943, a serious controversy had developed between plaintiff and defendant in connection with his objections to doing a type of picture which he feared would jeopardize his professional standing as an actor; that this controversy, coupled with his refusal to work in said picture, served to aggravate or revive in an aggravated degree the strained relations then existing between him and one of defendant's executives, and furthermore greatly angered, not only this official, but also at least two other executives of defendant; that accordingly they undertook to discipline and make an example of plaintiff or, to paraphrase an expression used by one of the counsel, to compel him to become a good boy. What these officials thereafter caused to be done, as well as what otherwise subsequently ensued, has already been described in some detail.

True, when plaintiff breached the contract on April 12th, defendant became entitled as a matter of law either to terminate the contract, or to avail itself of such rights as were granted to it thereunder. It adopted the latter alternative. One of these rights was to employ another person to portray the photoplay role which plaintiff had declined to fill. Another was to refuse to compensate him for the period required by the substitute to portray such role, in other words, suspend his employment for such

time. A still further right was to continue the term of his contract for a corresponding period.

However, when defendant determined not to terminate the agreement but, instead, to avail itself of the several cumulative rights granted to it thereunder, it necessarily followed that the contract remained in force, not only for its benefit, but also for that of plaintiff. Hence, defendant [298] was still bound to discharge such obligations as the agreement imposed on it. In other words, to paraphrase the rather trite expression that one may not eat his cake and have it too, in this instance defendant was not entitled to retain the rights accorded to it under the contract, and at the same time be relieved from its obligations thereunder.

The several thousand words comprising this document deal almost entirely with the obligations imposed upon plaintiff or the rights granted to defendant, or both. Virtually the only right given to the former and the correlative obligation imposed on the latter by the contract—certainly the most important from his standpoint—involves his right to compensation and its liability to pay the same. The refusal to pay such compensation, therefore, constituted a very material breach of the agreement and not a mere trivial one.

Consequently, when on April 12, 1943, defendant suspended plaintiff's employment for the duration of the war and removed him from its payroll, thereby barring him from compensation correspondingly, it rendered futile any subsequent demand for the payment of compensation owing to him for the period succeeding the completion by the substitute of the role of Hank. Such action on its part was unwarranted and arbitrary, and furthermore constituted an anticipatory breach of the contract. It also rendered unnecessary any demand for the payment of

such compensation, for the law does not require the doing of an idle act. Accordingly, plaintiff was not required to make such a demand as a condition precedent to terminating the contract, although as previously indicated, we have found such a demand was in fact made.

There is yet another serious factor which militates against the position of the defense, and which arises out of [299] the circumstances surrounding the sending of the telegraphic notices of Saturday, April 10th. As already pointed out, these telegrams were not delivered to the telegraph office until after 6 P. M. that night, and yet they purported to instruct plaintiff to report at defendant's studio on the following Monday morning at 10 A. M. thereof. Later, on that same Monday, the telegraph company gave to defendant information of a character sufficient to apprise a reasonable person that if such telegram were intended to advise plaintiff he was needed at the studio for a conference with one of defendant's executives, or for any purpose other than to portray the role of Hank, then no adequate notice for that purpose had been given. Hence, even if defendant's explanation of the meaning of these telegrams were to be accepted—a construction with which we cannot agree—nevertheless, under the circumstances aforementioned we should still be obliged to find that such notice had not been given in time. For this additional reason defendant's conduct in suspending plaintiff's employment for the duration of the war must be held to have been arbitrary and unwarranted.

Let us now examine the contention that because, without defendant's knowledge or consent, plaintiff was absent from Los Angeles County from the 19th to the 29th of May, 1943, during which period he was engaged in activities connected with the Civil Air Patrol, he is barred

from any relief herein. Without intending to repeat our analysis of the evidence relevant to this point, we deem it a sufficient answer to state that on the basis of the construction given to the contract by the parties themselves, as shown by the practice which they followed with respect to this matter up to May, 1943, plaintiff's physical presence was not required in Los Angeles County continuously during periods intervening [300] between the production of pictures and while defendant was in contact with him through his known agent. As previously shown, at least two of defendant's executives were adequately informed concerning these activities on plaintiff's part, and not only did they fail to disapprove them, they also encouraged the same. Likewise as heretofore noted, on April 12th defendant suspended plaintiff's employment for the duration of the war, and hence it would have availed him nothing to have remained in Los Angeles County from and after May 19th.

There remains to be considered the defense that, if defendant breached the contract, such breach resulted from an excusable mistake, from which default it is entitled to be relieved; and that in consideration of such relief it is willing and offers to do full equity, including the payment of such compensation as the Court may find to be due him. As the record discloses, this defense was not interposed until after the lapse of more than six months after the agreement had been broken and plaintiff had given notice of termination thereof. Throughout that period defendant had insisted, both that it was not obligated to pay plaintiff any compensation, and also that the agreement still was in effect and prohibited him from working for anyone else. In fact, this plea was presented by way of a further amendment to the answer, as an additional defense, and without abandoning any other issue raised herein and was offered at a time when, dur-

ing the course of the oral argument upon defendant's motion for an injunction pendente lite, the court expressed doubt as to the soundness of the reasoning upon which defendant sought to justify its refusal to compensate plaintiff. Furthermore it should be observed that this offer to do equity is conditioned upon the Court first deciding that money or compen- [301] sation became due from defendant to plaintiff on or after May 26, 1943. In other words, unless and until such a finding shall have been made, and only upon that condition, is defendant willing to do equity. As previously indicated, defendant's refusal to pay compensation to plaintiff on or after May 26, 1943, was arbitrary and unwarranted. It was not the result of mistake, unavoidable accident, fraud, surprise or ignorance. We are not persuaded that this offer to do equity is either timely or meritorious.

Accordingly, on the basis of the record as above outlined and for the reasons hereinbefore set forth, we conclude that at least by May 29, 1943, plaintiff became entitled to terminate the contract, and that on said date he elected to and did terminate the same; also that defendant has failed to establish any of the defenses pleaded herein; and that plaintiff is entitled to relief under the first count of the complaint, more particularly, to a decree adjudging the aforementioned contract to have been terminated on the last mentioned date.

At the trial we suggested that counsel consider whether there was any question as to the Court having jurisdiction of the subject matter of the second count, inasmuch as the same purported to be a cause of action to recover less than the sum of Three Thousand Dollars (\$3,000.00) allegedly due under a contract. The record discloses that the present suit was originally filed in the Superior Court of the State of California, in and for Los Angeles County,

and that the litigation was removed to this Court upon petition of defendant. Said petition alleged, among other matters, that the within cause is one and presents a controversy wholly between citizens of different states and that the matter in controversy, exclusive of interest and costs, exceeds in value the sum of [302] Three Thousand Dollars (\$3,000.00), said matter being the right of plaintiff to recover the sum of Ten Thousand Two Hundred and Fifty Dollars (\$10,250.00) claimed to be due plaintiff from defendant as salary. Upon said petition the state court granted an order, finding that the within cause is wholly between citizens of different states, that the matter in controversy exceeds in value the sum of Three Thousand Dollars (\$3,000.00), and that said action is one of which United States District Court is given jurisdiction, and adjudged that said cause be transferred and removed to this Court.

Further study convinces us that, although the parties proceeded to trial solely upon the issues raised by the first and second counts of the complaint and the answer and the amendments thereto, nevertheless, the matter of jurisdiction must be determined upon the state of the pleadings, more particularly the complaint when the suit was originally filed. Upon an examination of that record, we are satisfied that the Court has jurisdiction of the subject matter, as well as of the parties. As indicated by our previous analysis of the evidence, plaintiff became entitled to compensation from defendant on May 26, 1943, and also for the subsequent period up to the date of termination of the agreement. Hence, the findings and decree hereafter to be signed herein should include an award in the amount owing on account of such unpaid compensation.

[Endorsed]: Filed Mar. 6, 1944. [303]

At a stated term, to-wit: The February Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 6th day of March in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable Harry A. Hollzer, District Judge.
No. 3242-H Civil

Robert Cummings,

Plaintiff,

vs.

Universal Pictures Company, Inc., a corporation,
Defendant.

For the reasons set forth in the Memorandum of Conclusions this day filed, it is ordered that counsel for plaintiff prepare and submit Findings and Decree in conformity therewith, serving a copy upon opposing counsel.

Copies to counsel. [304]

[Title of District Court and Cause.]

OBJECTIONS AND AMENDMENTS TO
PROPOSED FINDINGS AND JUDGMENT.

Comes now the defendant and cross-complainant and makes the following objections and the following proposed amendments to [305] the proposed findings of fact and conclusions of law and the proposed judgment heretofore served and filed by plaintiff, that is to say:

A. As to said proposed findings of fact and conclusions of law:

1. Defendant and cross-complainant (hereinafter referred to as "defendant") objects to that part of paragraph numbered (3) on page 3, beginning on line 8 and concluding with the words "plaintiff compensation" in line 13, and suggests the following in lieu thereof:

"(3) On or prior to April 10, 1943, defendant demanded of plaintiff that plaintiff portray the role of 'Hank' in the photoplay then entitled 'Fired Wife,' and that he report to the Studio of defendant to commence the performance of said role on April 12, 1943, and for the purpose of receiving instructions as to future roles. Plaintiff refused to, and did not, comply with said demand. Plaintiff then and there notified defendant that he, plaintiff, would not perform any of his obligations under said contract, and plaintiff thereby repudiated said contract. Plaintiff did not play said role of 'Hank' in said photoplay entitled 'Fired Wife,' and thereby breached said contract. Thereafter, on April 15, 1943, defendant served a written notice on plaintiff."

2. Defendant objects to that portion of paragraph numbered (5) on page 4, beginning with the word "advising" in line 25 and ending with the word "suspended" in line 30.

3. Defendant proposes that paragraph numbered 6 on page 6 be amended by inserting at the beginning thereof the following:

"Plaintiff never cured his breach as aforesaid, and never retracted his repudiation as aforesaid"; [306]

and by striking out "April 10" in line 6 thereof, and substituting therefor "April 12."

Defendant further objects to that portion of said paragraph 6 beginning with the word "No" in line 8 and ending with the word "contract" in line 11.

4. Defendant objects to the word "not" in line 12 in paragraph numbered 7 on page 6, and to "April 10" in said line, and suggests that the word "not" be stricken out, and that "April 11" be substituted for "April 10."

Defendant further objects to that part of said paragraph 7 beginning with line 26 on page 6 to and including the word "plaintiff" in line 31 on page 6-a.

5. Defendant objects to paragraph numbered 8, beginning with line 32 on page 6-a.

6. Defendant objects to paragraph numbered 9, beginning with line 18 on page 6-b.

7. Defendant objects to paragraph numbered 10, beginning on page 6-b, and to that portion of paragraph 11

on page 6-c and lines 1 and 2 on page 7, and in lieu thereof suggests the following:

“(10) On May 26, 1943, plaintiff appeared at the offices of defendant and inquired of a clerk in the employ of defendant whether a check for the payment of salary beginning May 20, 1943, and ending May 22, 1943, was available, and was informed by said clerk that such check was not available.”

“(11) Defendant’s failure to pay salary for that portion of the week beginning on May 20, and ending on May 22, both dates inclusive, did not constitute a material, or any, breach of said contract. On May 29, 1943, plaintiff sent a written notice to defendant as follows:” [307]

8. Defendant objects to paragraph numbered (13) on page 10.

9. Defendant objects to paragraph numbered (14) on page 10, and in lieu thereof suggests the following:

“(14) Prior to commencement of the above entitled action an actual controversy did exist between said parties, and it was and is necessary for the Court to declare the rights of said parties arising from the facts which are herein found and which were heretofore alleged, the plaintiff having asserted and still claiming that said contract was terminated as of May 19, 1943, and the defendant having asserted and still contending, among other things, that said contract still existed between plaintiff and defendant.

“In that behalf the Court finds that said contract is in full force and effect.

“On the second cause of action, the Court finds that defendant is not indebted to plaintiff for salary or compensation for that portion of the week beginning May 20, 1943, and ending May 22, 1943, or **for the week beginning May 24, 1943, and ending May 29, 1943, or for any sum whatever.**”

10. Defendant objects to paragraphs I, II, III, IV, V, VI, VII, and VIII, beginning on page 11 and ending on page 17.

11. Defendant objects to paragraphs numbered IX, X, XI, XII, XIII, XIV, and XV beginning on page 18 and ending on page 20, and in lieu thereof suggests the following:

“I.

“It is true that plaintiff is wholly without equity and is not entitled to invoke the aid of the Court to terminate or rescind plaintiff’s obligations to perform said contract. [308]

“It is true that defendant is entitled to invoke the aid of the Court to prevent the termination and cancellation of said contract by plaintiff, by reason of the breach and repudiation of the plaintiff as herein found.

“II.

“It is true that defendant has offered to fully pay and restore to plaintiff any sums of money or compensation that the Court may find to be due to plaintiff. In that behalf, the Court finds defendant is entitled to equitable relief, but that plaintiff is not entitled to any sum or sums whatever as the condition to such relief, or otherwise, or at all.

“III.

“It is true that plaintiff is estopped to claim any breach of the contract on the part of defendant.

“IV.

“It is true that plaintiff was not available at all times continuously, or at any time, from May 19 to May 29, 1943, to perform such services as defendant might require plaintiff to perform under said contract.

“V.

“It is true that on many occasions prior to April, 1943, and on a number of occasions after April, 1943, plaintiff was frequently outside the County of Los Angeles; but it is true that defendant had no knowledge whatever of any of such absences.”

B. As to said conclusions of law:

1. Defendant objects to paragraphs numbered II to XXIV, both inclusive, and in lieu thereof suggests the following:

“II.

“Defendant is entitled to judgment that said contract [309] is in full force and effect, and plaintiff is not entitled to take anything by his action.

“III.

“Defendant is entitled to costs.”

C. As to said judgment:

1. Defendant objects to paragraphs numbered (1) and (2) on pages 2 and 3, and in lieu thereof suggests the following:

“(1) The written contract between plaintiff and defendant, dated November 21, 1938, as amended, is declared to be in full force and effect.

“(2) Plaintiff is not entitled to take anything by his action, and the same should be, and hereby is, dismissed with prejudice.

“(3) Defendant is entitled to costs.”

Defendant further shows the Court that the reasons for the written objections and proposed amendments are stated in the supporting Memorandum filed concurrently herewith.

Dated April 21, 1944.

Respectfully submitted,

Loeb and Loeb

Joseph L. Lewinson

By Joseph L. Lewinson

Attorneys for Defendant and Cross-Complainant.

Received copy of the within Objections and Amendments this 21st day of April, 1944. Roth & Brannen (Kohl), attorneys for plaintiff.

[Endorsed]: Filed Apr. 21, 1944. [310]

[Title of District Court and Cause.]

ANSWER TO OBJECTIONS AND AMENDMENTS
TO PLAINTIFF'S PROPOSED FINDINGS AND
JUDGMENT.

Defendant in its "Objections and Amendments to Proposed Findings and Judgment" and the "Memorandum" in support thereof seeks to attack the proposed findings and judgment by two techniques:

1. The first is by reference to minute portions of the evidence which is in conflict with the evidence supporting plaintiff's findings, with a significant omission of any reference to the evidence supporting said findings. In certain instances this is accomplished by taking certain portions of plaintiff's testimony out of their context and applying a strained and unnatural construction thereto. [311]

2. The second technique is by raising certain questions of law. The legal conclusions reached in defendant's cited cases are based upon facts which do not exist in the present transcript and raise issues of law not involved in the present case.

None of the matters raised in defendant's aforesaid documents present any question that may be considered as an attack on the proposed findings and judgment.

A. Plaintiff's proposed findings and judgment are all supported by the transcript of the evidence. Defendant's first technique merely refers to minute portions of the evidence which are in conflict with the evidence supporting the findings or refers to certain testimony of the plaintiff taken from its context and applying a strained construction thereto. Even assuming (for argument only) that the conflicting evidence and the isolated portions of

plaintiff's testimony relied upon by defendant would support the construction placed upon them by defendant or would support contrary findings, defendant has been unable to and has not attacked the evidence in support of the findings nor indicated that a single finding is not supported by evidence in the record. This does not constitute an attack upon the findings. Trials without some conflict in the evidence are few and far between, and the citation of evidence in conflict with evidence supporting the findings without a showing that the findings are not based on evidence in the record after the court has found for plaintiff, is in reality an admission that the findings are supported.

The judgment and all of plaintiff's findings are supported by the transcript. Because of the aforesaid, and in view of the fact that the court has already carefully and comprehensively weighed and interpreted the testimony in this trial in a complete opinion filed in this case, it would serve no useful purpose and would be repetitious for plaintiff to now burden the court with detailed references and quotations from the transcript in support [312] of the submitted findings.

B. Defendant's legal points are based upon assumed facts not contained in the evidence and raise legal questions not involved in the case at bar.

1. Defendant first cites authority to the effect that plaintiff cannot put defendant in default while plaintiff himself is in default. This is a correct statement of law, but has no application to the present case. The two grounds of default relied upon by defendant are: (1) that plaintiff refused to play the role of "Hank" in the photoplay entitled "Fired Wife," (2) that plaintiff repudiated the contract by refusing to play in any pictures of

the type of "Fired Wife" or in which Lamont was a director. Plaintiff concedes the first breach and has incorporated a finding to that effect. The second alleged breach relied upon by defendant is completely unsupported by the evidence. If the isolated testimony of plaintiff referred to by defendant on pages 6, 7 and 8 of defendant's memorandum is read in its complete context and in the light of all the evidence, it is clear that the conversations of April 5 were confined solely to the dispute involving the photoplay "Fired Wife" and the promises in regard to said photoplay made by the studio to plaintiff. It is impossible to expand this testimony of plaintiff to matter outside this specific photoplay and thereby construe it as an unequivocal repudiation of the entire contract. Plaintiff has always admitted its breach in refusing to play the role of "Hank" in "Fired Wife" and admitted that defendant could have terminated the contract therefor under the express option reserved by defendant in the contract itself. Defendant did not do so, but in lieu thereof suspended plaintiff pursuant to its contractual option for the period during which said role was completed by another person. The propriety of the suspension was and is conceded by plaintiff, but when said role was completed the breach was at an end and plaintiff has paid the penalty therefor. [313] At the time plaintiff's demand for salary was refused, he was no longer in default.

2. Defendant's discussion of the issue of availability has already been fully argued, both orally and in written briefs. There was no breach of plaintiff's contractual obligation of availability since the contract does not require plaintiff's constant physical presence in Los Angeles. The uncontradicted evidence shows that plaintiff was never more than five and a half hours traveling time

by automobile from Los Angeles; that he could always be contacted by telephone and that his agent, Oscar Cummins, to whom the studio was directed to serve notices, maintained telephone contact with plaintiff during all the times that plaintiff was not physically in Los Angeles (Tr. page 325). The case of *May vs. New York Motion Picture Corp.*, 45 C. A. 396, cited by defendant on page 10 of its memorandum, has already been considered in previous briefs wherein it was shown that in that case the studio specifically ordered the actress to appear at the studio every morning at 8:30 o'clock A. M. The issue involved in the *May* case is succinctly stated by the court on page 401 of the opinion:

“Whether this order is consistent with the written contract of employment, and whether it is a reasonable order, are the principal questions presented on this appeal.”

The court there correctly held that this was a reasonable order under the contract and that the actress there breached her contract by refusal to comply with said order. There was no such order in the present case, and in the absence thereof plaintiff was under no obligation to physically appear at the studio every day or to physically remain in Los Angeles every day in order to be “available” under the terms of the contract. The only order in the present case was contained in the telegram referred [314] to as the telegram of April 10, which was never delivered to plaintiff and which, in any event, was not a continuing order to appear at the studio every day but only ordered plaintiff to appear on April 12.

That both parties themselves construed the contract as not requiring plaintiff's physical presence in Los Angeles

is conclusively borne out by the transcript. Brief reference may be made to defendant's contention that the issue of waiver cannot be considered because plaintiff did not plead it: (1) plaintiff has from the beginning contended that it never breached the obligation of availability. Plaintiff could not have pleaded a waiver of the breach without admitting the breach; (2) defendant itself raised the issue of availability (and did so only in the last days of trial) as a defense. The same is therefore deemed denied. Plaintiff is not required to anticipate a defense. Defendant's further contention on page 11 of its memorandum that there could be no waiver because it nowhere appears in the testimony that defendant had knowledge of the fact that plaintiff's activities in the C. A. P. would require his presence outside of Los Angeles is contradicted not only by the transcript generally but by the testimony of Mr. Muhl as quoted by defendant itself on page 13 of its memorandum:

"On cross-examination Mr. Muhl testified that on one occasion prior to April 10, 1943, he had seen Robert Cummings in uniform on the C. A. P. and that he knew Cummings was in the C. A. P. for some time prior to April 10; also Cummings had told him 'some of his experiences.'" (Underscoring ours.)

This testimony of Mr. Muhl itself admits that Cummings told him of his various activities in the C. A. P. [315]

3. Defendant's contention that by application of the doctrine of constructive notice, the telegram of April 10 was delivered on Sunday, April 11, can not be sustained. The theory is that plaintiff, having knowledge of the fact that defendant attempted to deliver a telegram to him,

was under a duty to learn its contents. First, this legal conclusion is based upon facts contrary to the uncontradicted testimony in the case. Not only is there no evidence in the case to the effect that neither plaintiff nor his agent knew of the studio's attempt to deliver the telegram of April 10, but all the evidence is to the contrary. The testimony of plaintiff referred to on pages 16 and 17 of defendant's memorandum, even when construed most strongly against plaintiff, does no more than indicate that he could not remember hearing of such telegram and really indicates his sincere attempt to recall the truth. In addition, the testimony of his agent, Oscar Cummins, unequivocally shows that the existence of the telegram was not known. There being no knowledge of the telegram in the first place, defendant's theory of imputing the contents thereof to plaintiff by the doctrine of constructive notice must fall. Secondly, as has already been fully argued, a proper construction of the contract places the burden upon the defendant studio to notify and direct plaintiff to perform, and the law properly applicable in this situation is that the party preparing and sending the notice takes all the risks of any defects and misconstruction thereof by the receiver. The duty was therefore on defendant and not on plaintiff.

4. Defendant's contention that even though the studio's refusal to pay plaintiff's salary was a breach the latter was not thereby justified in quitting his employment is contrary to law.

(a) Plaintiff not only lacks the temerity to question the wisdom of the great Justice Cardozo or the principles of law he has enunciated in the case of *New York Life Insurance Co. vs. [316] Viglas*, 297 U. S. 672, 80 L. Ed. 971, cited by defendant, but readily accepts the same. How-

ever, the learned justice with equal profundity has himself distinguished that case from the case at bar. The first distinction is contained on page 674 of the opinion (80 L. Ed.) wherein Justice Cardozo states:

“Upon the showing made in the complaint there was neither a repudiation of the policy nor such a breach of its provisions as to make conditional and future benefits the measure of recovery.” (Underscoring ours.)

In the case at bar plaintiff is not seeking future benefits or full damages under the contract based on the theory of anticipatory breach but is merely seeking to be relieved of further performance by reason of the refusal to pay his salary. The latter principle is established in California by the case of *Percival vs. National Drama Corp.*, 181 Cal. 631, heretofore cited by plaintiff, which specifically holds that in an employment contract a repudiation of the contract is not necessary to entitle plaintiff to quit his employment, but that mere failure or refusal to pay his salary is sufficient. This fundamental principle of the law of master and servant is also set forth in 39 Corp. Jur. 79, Section 77:

“The neglect or refusal by the employer to pay the agreed compensation will justify an abandonment by the servant.”

Defendant has cited no authority involving employment contracts to the contrary.

Even where future benefits are sought as the measure of recovery, Justice Cardozo sets forth a second limitation upon the doctrine of the *New York Life Insurance Co.* case. On page 976 (80 L. Ed.) it is stated: [317]

"We have no thought to suggest an invariable rule whereby the full value of a bargain may never be recovered for any breach of contract falling short of repudiation or intentional abandonment. All depends upon the circumstances. *Helgar Corp. v. Warner's Features*, 222 N. Y. 449, 452-454, 119 N. E. 113. There may be times when justice requires that irrespective of repudiation or abandonment the sufferer from the breach shall be relieved of a duty to treat the contract as subsisting or to hold himself in readiness to perform it in the future. *Roehm v. Horst*, supra (178 U. S. 17, 18, 44 L. ed. 960, 20 S. Ct. 780); *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 487, 33 N. E. 561. Generally this is so where the contract is a bilateral one with continuing obligations, as where a manufacturer has undertaken to deliver merchandise in instalments." (Underscoring ours.)

In the New York Life Insurance case nothing remained to be done under the contract but the payment of insurance benefits. In such a case the plaintiff is not harmed by a refusal to accelerate its future benefits under the contract. In the case at bar, plaintiff would be required to continue performance by the rendition of services and the latter situation is specifically excluded from the doctrine of the New York Life Insurance Company case. The reason for the distinction is stated by Justice Cardozo on page 976 (80 L. Ed.):

"On the other hand, a party to a contract who has no longer any obligation of performance on his side but is in the position of an annuitant or a creditor exacting payment from a debtor, may be compelled to wait for the instalments [318] as they severally

mature, just as a landlord may not accelerate the rent for the residue of the term because the rent is in default for a month or for a year.”

(b) The breach in the case at bar is material. The authorities and arguments of defendant on the point of materiality are inapplicable since they do not involve master-servant contracts but involve commercial contracts of a separable and divisible nature. An employment contract, as in the case at bar, is entire and indivisible. In the California Supreme Court case of *Seymour v. Oelrichs*, 156 Cal. 782, at page 802, this principle is specifically set forth:

“A contract of employment for a year for a certain sum per week, payable weekly, is entire and indivisible, and only one action for the breach thereof can be maintained by the discharged employee.”

The failure or refusal to pay an employee salary is therefore a material and substantial breach. As the court has already pointed out in its opinion, plaintiff's salary was his most important right under this contract of several thousand words. Repudiation of the entire contract is not the only form of material or substantial breach.

(c) Although defendant does not have to go so far as to establish a repudiation of the contract as contended by defendant, the evidence in the case at bar shows such a repudiation in that defendant wilfully refused payment of the salary after demand therefor and continued and persisted in such wilful and wrongful refusal.

(d) California Civil Code, Section 1765, which is the Uniform Sales Act, does not overrule the master-servant

principle enunciated in the Percival case as defendant contends: (1) the Uniform Sales Act is confined to sales of goods and has no effect upon employment contracts; (2) even in sales cases, the [319] statute states that the buyer's rights "depends in each case on the terms of the contract and the circumstances of the case." (Under-scoring ours.) Under the terms and circumstances involved in the present case the breach was certainly material.

Plaintiff respectfully submits that plaintiff's proposed Findings of Fact, Conclusions of Law and Judgment be accepted.

Respectfully submitted,

ROTH & BRANNEN

By Lester Wm. Roth

Attorneys for Plaintiff

Received copy of the within Answer this 9th day of May, 1944. Joseph L. Lewinson, attorney for defendant.

[Endorsed]: Filed May 9, 1944. [320]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR ORDER OF DISMISSAL AND JUDGMENT ON THE PLEADINGS.

To the Above Named Plaintiff, and to Messrs. Roth and Brannen, and Joseph J. Cummins, Esquire, His Attorneys:

You, and each of you, will please take notice that on Monday, May 22, 1944, at the hour of 10:00 o'clock A.

M., or as Z321] soon thereafter as counsel may be heard, we will appear before the Honorable Harry A. Hollzer, a judge of the above entitled Court, in the room usually occupied by him as a court room in the United States Post Office and Court House Building, at Los Angeles, California, and then and there move the Court for an order dismissing the First and Second Causes of Action attempted to be alleged in the complaint on file, on the ground that said alleged causes of action, and each of them, fail to state a claim upon which declaratory, or any, relief can be granted; and we will further move the Court for judgment on the pleadings on the Fourth Cause of Action attempted to be alleged in said complaint, on the ground that said alleged cause of action fails to state a claim upon which any relief can be granted.

Said motions will be made on the complaint on file, on the pleadings responsive to the alleged Fourth Cause of Action, and upon the evidence heretofore taken in said cause.

Dated May 10, 1944.

LOEB AND LOEB
JOSEPH L. LEWINSON

By Joseph L. Lewinson
Joseph L. Lewinson

Attorneys for Defendant and Cross-Complainant.

[Endorsed]: Filed May 10, 1944. [322]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS,

Judge Hollzer's Calendar,

August 21, 1944.

Following the trial and submission of this cause upon the first two counts of the complaint—the third count having been dismissed, and the parties having stipulated to suspend proceedings on the fourth count—and after appraising the evidence and giving consideration to the legal issues involved, the Court filed a rather comprehensive memorandum of conclusions. As indicated in said memorandum, the Court concluded that plaintiff was entitled to recover upon the first and second counts of the complaint.

Thereafter counsel for plaintiff submitted proposed findings and judgment. Subsequently counsel for defendant filed objections and amendments to such proposed findings and judgment. Still later there was presented on behalf of defendants a motion for an order dismissing the first and second counts and also a motion for judgment on the pleadings on the fourth count of the complaint, said motions being made on the complaint, also on the pleadings responsive to the fourth count of the complaint, and upon the evidence taken at the trial.

As the record discloses, the counsel who represented [331] defendant at the trial of this cause did not attend the various proceedings heard preliminary thereto, and likewise the counsel who argued the aforementioned motions on behalf of defendant attended neither the trial

nor said preliminary proceedings. Near the close of the argument upon said motions, the Court called attention to a portion of its memorandum of conclusions wherein, at page 44, there was quoted a statement made by defense counsel during the course of the oral argument at the close of the trial. That quotation read as follows:

"Now there is of course a very decided conflict in the evidence with respect to what was said both on April 3rd and April 5th. The plaintiff denies that he said that he was going into the Civil Air Patrol, or the Army, for the duration on April 3rd. I think that is the only real controversy with respect to that conversation. Generally speaking, the parties, that is, Bob Speers and Bob Cummings, agree on the general substance of that conversation. Then we come, of course, to the more important conversation of April 5th on the telephone. In that respect, Bob Speers, refreshing his recollection from the memorandum made three months later, said that the following Monday he had a telephone conversation with Robert Cummings in which he stated that he had made up his mind not to do the picture because he felt it was his duty to give 100% of his time to war work and therefore was signing up with the Civil Air Patrol for the duration. Here again we have a direct conflict in the evidence. To my mind, the credibility of Bob Speers is an important [332] issue in the case because everything flows from that conversation of April 5th. If Robert Cummings didn't make that statement our affirmative defense of estoppel goes right out of the window."

Following the quotation of the foregoing excerpt, the Court commented: "My idea in calling attention to this is to ask counsel now arguing the motions as to what

meaning you make of that statement.” Thereupon, the following colloquy took place:

“Mr. Lewinson: That last sentence, I think, is ill-advised, to say the least, and should be withdrawn, and is hereby withdrawn.

“The Court: You don’t think it was a sound statement on the evidence and on the law?

“Mr. Lewinson: Certainly not, your Honor. No; it certainly wasn’t.

“The Court: To make my point clear, I recognize that counsel should not, as it were, be foreclosed from asserting what is the law or what is the final conclusion to be drawn from the evidence, but what I had in mind in calling this to the attention of counsel this morning is that it purports to state a position—

“Mr. Lewinson: Well, the position is not well taken. It concedes too much, and I can see where it very well might have misled the court. The rest of the statement, if I may put it in this cold and not too complimentary way, isn’t half bad. It isn’t too accurate, but the fact is, your Honor, as I indicated in my opening argument, Bob Speers and Muhl, and [333] the memoranda that they offered in support of their position, did stress the matter of the Civil Air Patrol. That is a thing that stuck out in their minds. I emphasized that this morning. There is a good deal in the testimony of Robert Cummings which explains that, because he said over and over again that he was going into the Civil Air Patrol and he said, also, that he couldn’t play “Hank” for that reason. He put a sort of saving clause on the matter. But the point of the matter is this: The whole question here is on a different phase of the

case. Did Robert Cummings in effect give notice that he wasn't going on with the contract according to its terms? Whether it took the form of a statement that he was going into the Civil Air Patrol or the form that he didn't like the director and wouldn't play under that director, or he didn't like his associates or didn't like money-making pictures, or various other reasons, is immaterial. The ultimate fact is, did he renounce and repudiate the contract? I think his own evidence and the evidence of his agent, disregarding entirely the version of the conversation given by Speers and Muhl, shows that he did repudiate the contract.

"I am glad your Honor brought this matter up, because I think it was impliedly withdrawn by the position that I took; now it is expressly withdrawn." [334]

Again, it should be noted that at the trial counsel then representing defendant was unwilling to accept certain views advanced by defendant's original counsel, who had appeared in support of its application for an injunction pendente lite.

In addition, we believe it to be appropriate to call attention to certain comments made by the Court following the oral arguments of counsel at the close of the trial. Upon that occasion we stated in part:

"And I think, as defense counsel very frankly stated a few moments ago, that at least during the conversation between the plaintiff and Speers that antedated the sending of the telegrams of April 10th, it could not fairly be charged that the plaintiff was seeking to break the contract by, in effect, threatening that unless he got a new deal from the defendant

he would give all of his time either to the Civil Air Patrol or to some other military service.

"I think it is also fair to say that the plaintiff, so far as anything disclosed in the courtroom may be considered, including his testimony, both direct and cross, has evidenced no feeling of either ill-will or of resentment or of anger against any of the defendant's executives. His manner, his attitude on the stand, his demeanor, as we call it, has impressed me as rather exceptional in that regard, and particularly because of the contrast which has been displayed by some of the witnesses on the stand. If my appraisal of these witnesses is sound, I cannot say that Speers was equally [335] charitable, and, before reaching a conclusion as to how much credence to give to certain of the defendant's witnesses, as I have already indicated, I want to examine painstakingly the copies of the memoranda from which they testified."

These changes with respect to counsel perhaps account for the varied positions taken at different stages of this cause by the defense, and possibly also explain the difficulty the latter seemingly has experienced in arriving at what we regard as a correct appraisal of the record.

Be that as it may, we are persuaded that the interpretation of the record, which defendant has advanced in support of the motions now under consideration, and also as the basis of its objections and amendments to the proposed findings and judgment, is erroneous.

Having heard the witnesses, and after applying the pertinent rules governing the determination of their credibility and what weight should be accorded to their testi-

mony, it is our conclusion that the only breach of contract committed by plaintiff consisted of his refusal to perform the role of "Hank" in the photoplay "Fired Wife." The contract involved herein gave to defendant, in the event of such a breach, certain remedies, provided it chose not to resort to the remedy arising as a matter of law, namely, to terminate the agreement. Admittedly, it took the position that the contract would remain in full force and effect. Under such circumstances, plaintiff's right to a resumption of compensation upon the completion of said photoplay, and defendant's obligation to pay the same, likewise were preserved. [336]

The latter obligation was breached by defendant. As pointed out in our prior memorandum of conclusions, this was the most important obligation owing to the plaintiff under the agreement. Concededly, defendant not only failed to pay such compensation, but also took the position that it was not required to pay the same for the duration of the war. In an effort to justify its course, defendant has sought to place upon plaintiff's statements and acts, and those of his agent, an unreasonable interpretation. It has endeavored to give to the contract a construction different from that which the parties had placed thereon by their own acts and conduct.

We are convinced that the defendant's failure and refusal to pay compensation to plaintiff subsequent to the completion of the photoplay "Fired Wife" constituted a material breach of the agreement, and that the conclusions set forth in our prior memorandum should not be set aside. Accordingly, plaintiff is entitled to an order denying defendant's motions, and is further entitled to have the findings and judgment signed and filed.

Copies to counsel.

[Endorsed]: Filed Aug. 21, 1944. [337]

At a stated term, to-wit: The February Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 21st day of August in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable Harry A. Hollzer, District Judge.

No. 3242-H Civil

Robert Cummings,

Plaintiff,

vs.

Universal Picture Company, Inc., a corporation,

Defendant.

For the reasons set forth in the Memorandum of Conclusions this day filed, it is ordered that defendant's motion for an order dismissing the first and second counts of the complaint, and also defendant's motion for judgment on the pleadings on the fourth count thereof, be denied.

It is further ordered that defendant's objections and amendments to plaintiff's proposed findings and judgment be overruled. [338]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Heretofore and on January 4, 1944, the above entitled action came on regularly for trial before the Honorable Harry A. Hollzer in the above entitled court, sitting without a jury, plaintiff being present in person and by his counsel, Roth & Brannen by Lester Wm. Roth and Joseph J. Cummins, and defendant being present by its counsel, Loeb & Loeb by Grant Cooper, and it having been stipulated at the outset of the trial by the parties through their respective counsel that the primary issues for decision were comprised within the first and second causes of action of plaintiff's complaint and the answer of defendant, as [339] amended, and that if the court should decide said causes of action in favor of plaintiff that it would be unnecessary to try the fourth cause of action, and the third cause of action having been dismissed by plaintiff, and it further having been stipulated by the parties through their respective counsel that the motion for summary judgment heretofore made by plaintiff and the motion for injunction pendente lite heretofore made by defendant need not be argued or presented, and counsel for defendant having stated in open court that the motion for injunction pendente lite was moot and plaintiff having stated that the motion for summary judgment would of necessity be decided by the trial of said first and second causes of action, and it having been thereupon decided by said court that said motions and each of them go off calendar and said trial having been heard from day to day on January 4, 5, 6, 7, 10 and 11th and evidence both oral and documentary having been submitted on behalf of each of said parties

and the matter having been fully argued by counsel for the respective parties, orally and in briefs, and having thereupon been submitted to the court for its decision and said court now being fully advised in the premises, does hereby make its findings of fact and conclusions of law.

On the first cause of action the court finds that the following facts are true:

(1) Defendant is now, and was at all times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and is now, and was at all times hereinafter mentioned, qualified to do business in the State of California, with its principal office for the transaction of business in the City of Los Angeles, County of Los Angeles, State of California.

(2) On or about November 21, 1938, plaintiff and defendant entered into a written contract, a copy of which, as [340] originally executed, is annexed to the complaint marked Exhibit "A." Since November 21, 1938, said contract has at various and sundry times been amended by said parties, as per five amendments attached to the stipulation of facts on file herein marked Exhibit "A" and Exhibit "B." The said contract dated November 21, 1938, as amended, will hereinafter in these Findings be referred to as "the contract" or "said contract."

(3) On or about April 10, 1943, defendant demanded of plaintiff that plaintiff portray the role of "Hank" in a photoplay then entitled "Fired Wife." Plaintiff refused to and did not comply with said demand. Thereafter, on April 15, 1943, defendant served a written

notice upon plaintiff refusing to pay said plaintiff compensation. Said notice is as follows, to-wit:

"UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

April 15, 1943

Registered Mail

Mr. Robert Cummings

14111 Sherman Way

Van Nuys, California

Dear Mr. Cummings:

This is to notify you that by reason of your failure, refusal or neglect to perform your obligations under your contract of employment with us dated November 21, 1938, as heretofore amended, and particularly by reason of your failure, refusal or neglect to report to us on April 12, 1943 in accordance with our notice to you dated April 10, 1943, we elect to and do hereby exercise the right granted us under the provisions of paragraph 12 of said contract to refuse to pay you any compensation during the period of such failure, refusal or neglect. [341]

At the time of such failure, refusal or neglect you were cast to portray a role in a photoplay, to-wit: the role of 'Hank' in the photoplay now entitled 'Fired Wife'. By reason of your failure, refusal or neglect, we are engaging another person to portray such role. We accordingly elect to and do hereby

exercise the further right granted us under the provisions of said paragraph 12 of said contract to refuse to pay you any compensation until the completion of such role by such other person.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

Edward Muhl

By Edward Muhl

epw:vv

Assistant Secretary."

(4) The role of "Hank" in the photoplay then entitled "Fired Wife" was completed by the person who had been substituted for plaintiff to portray such role on May 19, 1943.

(5) On May 18, 1943, defendant served a second written notice upon plaintiff advising plaintiff that by reason of his refusal to play the role of "Hank," and his suspension as a consequence of said refusal, that the term of said contract had been extended for a period of five weeks and two days commencing April 12, 1943, and advising plaintiff that he was being further suspended. Said written notice is as follows, to-wit: [342]

"UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

May 18, 1943

Registered Mail

Mr. Robert Cummings

c/o Mr. Oscar Cummins

9441 Wilshire Boulevard

Beverly Hills, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks and two (2) days commencing April 12, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies

which we may have in the premises, all such other rights and/or remedies being expressly reserved [343] by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

Edward Muhl
jab/j

By Edward Muhl
Assistant Secretary."

(6) Between the dates of April 10, 1943, and May 18, 1943, both inclusive, plaintiff received no notices of any kind or nature from defendant other than the two above pleaded. No demand, oral or written, was made by defendant at any time after April 10, 1943 that plaintiff report to defendant in connection with any other picture or for any services pursuant to said contract.

(7) It is not true that on April 10, 1943, defendant delivered to plaintiff any telegram or specifically the following telegram:

"You are hereby instructed to report at our studio at Universal City, California, at the office of Mr. Dan Kelley, at 10 o'clock Monday morning, April 12 for the rendition of your services under your contract of employment with us dated November 21, 1938, as heretofore amended and extended in connection with the portrayal of a role in our photoplay now entitled 'Fired Wife' and/or the rendition of such other services as we may require under said contract, as amended and extended."

It is true that on Saturday, April 10, 1943, one Speers, an employee of defendant, instructed his secretary to deposit with Western Union Telegraph Co. three telegrams, each addressed to the plaintiff and bearing the date last mentioned and that each of said telegrams, ex-

cept as to the address thereof, was worded identically as the telegram above quoted. Said telegrams were addressed as follows: [344]

One of these telegrams was addressed:

“Mr. Robert Cummings
Care Oscar Cummins
8511 Sunset Boulevard
Los Angeles, California.”

Another telegram was addressed:

“Mr. Robert Cummins
Care Oscar Cummins
527 California Bank Building
Beverly Hills, California.”

The third telegram was addressed:

“Mr. Robert Cummings
14111 Sherman Way
Van Nuys, California.”

It is true that on the same day at approximately six o'clock P. M. Speers' secretary left these telegrams at the Beverly Hills office of the telegraph company and that at about 10 A. M. of the following day, Western Union telegraphed defendant to the effect that the locations described respectively, 8511 Sunset Boulevard, etc., 527 California Bank Building, etc. were closed until morning and also that the person addressed at 14111 Sherman Way, etc. was out of the city and his address unknown and that the telegraph company had telephoned to Mrs. Oscar Cummins who would relay the message, and further that on Monday, April 12, at about 6 P. M. the telegraph company wired defendant to the effect that the telegram addressed to 527 California Bank Building, Beverly Hills,

Calif. had been telephoned on the preceding morning to the addressee's sister-in-law who would relay the message to him. None of the telegrams was delivered in the customary manner either to plaintiff or to his agent or in fact to any one purporting to be in contact with plaintiff.

(8) The only notice received by plaintiff from de- [345] fendant to report at the studios of defendant was an oral notice some days prior to or on or about April 10, 1943, requiring plaintiff to report at the studios of defendant on April 12, 1943, for the purpose of portraying the role of "Hank" in "Fired Wife." The telegrams above set forth were not delivered to plaintiff as required by the contract or otherwise, and plaintiff was never advised in writing, or otherwise, that defendant required plaintiff to report at the studios of defendant or at the office of Dan Kelly on the premises of defendant at 10:00 o'clock A. M. on the morning of April 12, 1943, or anywhere else for the rendition of services other than the portrayal of the role of "Hank" which might be required by defendant of plaintiff under the contract. And defendant, in fact, did not require plaintiff to report to its studios or to the office of Dan Kelly at 10:00 A. M. of April 12, 1943, or anywhere else, for the rendition of any services other than the portrayal of the role of "Hank" in the photoplay production "Fired Wife."

(9) No lay-off time was available to defendant at the time plaintiff was placed upon suspensions and none of the suspensions ordered by defendant were ordered because of any lay-off time to which defendant was entitled.

(10) On May 26, 1943, plaintiff, pursuant to the terms and provisions of said contract, appeared at the offices of the defendant and demanded of defendant pay-

ment of salary as fixed by said contract for that portion of the week beginning May 20, 1943 and ending May 22, 1943. Said contract provides that the payment of weekly salary by defendant to plaintiff be made on Wednesday of each week for services rendered in the preceding week from Monday to Saturday, both inclusive, or for any part of such preceding week. Defendant, at said time, to-wit, on May 26, 1943, failed and refused to pay salary to plaintiff in accordance with said contract and the demand of plaintiff and did not at said time, [346] and has not at any time since, nor has anyone on behalf of defendant, paid said salary to plaintiff in accordance with said contract and said salary has not been paid.

(11) Defendant's refusal and failure to pay salary to plaintiff for that portion of the week beginning on May 20th and ending on May 22nd, both dates inclusive, pursuant to the demand of plaintiff made on May 26, 1943, as aforesaid, constituted a material breach of said contract and plaintiff did promptly, and on May 29, 1943, advise defendant in writing of said material breach and his election to terminate said contract by reason of [347] said breach, said written notice from plaintiff to defendant being as follows, to-wit:

"Universal Pictures Co., Inc.
Universal City, California

May 29, 1943

Under date of May 18, 1943, you notified me that you considered my contract with you dated November 21, 1938, suspended for a period of 5 weeks and 2 days, commencing April 12, 1943, and you purported to exercise a right of extension with respect to said alleged suspension.

Under second paragraph of said letter, you state that said contract is further suspended after the expiration of said period because of my purported failure, refusal and/or neglect to perform my obligations thereunder. As you are well aware, there has been no failure, refusal and/or neglect of my part to perform my obligations under said contract at any time since the expiration of said period of 5 weeks and 2 days, assuming, without admitting, that there was such a failure with respect to said period of 5 weeks and 2 days. Assuming that you had the right of suspension for said period of 5 weeks and 2 days, such suspension would have ended on May 18, 1943. Accordingly, compensation was payable to me under said contract for the period after May 18, 1943. On May 26, 1943, (on which date compensation under said contract was payable to me), at or about 2:30 P. M., demand was made upon you for the payment of the compensation due and payable on said date.

At said time, you failed and refused to pay me the compensation which was due and payable under said [348] contract. Such failure and refusal was a material breach by you of your obligations under said contract and I hereby notify you that I elect to and do hereby terminate said contract by reason of such failure and refusal.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which I may have in the premises, all such other rights and/or remedies being expressly reserved by me.

ROBERT CUMMINGS"

(12) Thereafter, on June 2, 1943, defendant advised plaintiff in writing that it did not consider said contract terminated and that it did not consider that there had been any breach of said contract. Said notice from defendant to plaintiff, being as follows, to-wit:

“UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

June 2, 1943

Registered Mail

Mr. Robert Cummings

c/o Oscar Cummins

9441 Wilshire Boulevard

Beverly Hills, California.

Dear Mr. Cummings:

This is to acknowledge receipt of your telegram of June 1, 1943.

Please be advised that despite your purported termination of your contract with us, dated November 21, 1938, we will continue to treat and consider said contract as being in full force and effect. [349]

In our notice to you under date of May 18, 1943, we notified you that your employment under said contract, as amended, would be further suspended during the continuance of your failure, refusal and/or neglect to perform your obligations thereunder.

At no time since April 12, 1943, up to and including the present time, have you notified us of your willingness to perform pursuant to terms of said contract, as amended. If you are willing to resume your services under said contract, as amended, please notify Mr. Muhl at our studio, and upon your

reporting pursuant to such notification, we will terminate the suspension of your employment. Failing such notification by you, your employment will continue in suspension during the continuance of your present failure, refusal and/or neglect to perform your obligations under said contract, as amended, and until you do report ready to resume and perform your services under said contract, as amended.

We reserve the right to extend your employment under said contract, as amended, for a period equivalent to the period of such suspension, and this notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

Edward Muhl

By Edward Muhl

jab/j

Assistant Secretary" [350]

(13) Since May 29, 1943, there has been an interchange of notices and letters from defendant to plaintiff and from plaintiff to defendant, the purport of which is that defendant claims that said contract still exists and subsists between plaintiff and defendant, and plaintiff claims that said contract, by reason of the material breach of defendant as herein alleged, has been terminated by plaintiff as of May 29, 1943, and no longer exists between them. All of the written notices which are appended to, and made a part of the complaint of plaintiff, the answer and/or amended answer of defendant, the affidavit of plaintiff filed in connection with the Motion for Summary Judgment and the Motion for Temporary Restraining Order are authentic and were sent by

defendant and received by plaintiff, or sent by plaintiff and received by defendant, as the case may be. Since the filing of the above action defendant has sent, and plaintiff has received, two other notices dated respectively November 15, 1943 and December 20, 1943, both of which are appended to the Stipulation of Facts and marked Exhibit "B" thereto.

(14) Prior to the commencement of the above entitled action an actual controversy did exist between said parties, and it was and is necessary for the court to declare the rights of said parties arising from the facts which are herein found and which were heretofore alleged, the plaintiff having asserted and still claiming that by reason of the facts heretofore and herein found said contract was terminated as of May 19, 1943, and the defendant having asserted and still contending, among other things, that some of the facts theretofore alleged and herein found to be true were not true and, that even if true, said contract still existed between plaintiff and defendant.

On the second cause of action, the court finds the [351] following facts to be true:

(1) The findings of the first cause of action contained in Paragraphs 1 to 11, both inclusive, are hereby repeated and set forth as findings in the second cause of action, as fully as if set out herein at length.

(2) Under the terms of said contract, defendant is indebted to plaintiff for salary and compensation earned by plaintiff for that portion of the week beginning May 20, 1943 and ending May 22, 1943, both dates inclusive, and for the week beginning May 24, 1943 and ending May 29, 1943, both dates inclusive, in the sum of \$2,250.00.

(3) Prior to the commencement of the above entitled action, and specifically on May 26, 1943, plaintiff did make demand of defendant for the payment which had become due to plaintiff under the terms of said contract for that portion of the week beginning May 20, 1943 and ending May 22, 1943, but defendant failed, refused and neglected to pay said sum or any part thereof, and did not pay the sum thereafter that accrued to plaintiff for the week beginning May 24, 1943 and ending May 29, 1943, under the terms of said contract, the sum of \$1,500.00, and prior to the commencement of said action demand was made for said sum of \$1,500.00 and defendant failed, refused and neglected to pay said sum of \$1,500.00 or any part thereof, and the same has not nor has any part thereof been paid.

In respect of the answer and all amendments thereto and all special and separate defenses, formally pleaded and/or in respect of which evidence was adduced, the court finds as follows:

I.

All allegations of the answer, all amendments thereto and all allegations of all special and separate defenses [352] are untrue, except as hereinbefore or hereinafter specifically found to be true.

II.

It is true that on or about April 3, 1943 plaintiff informed defendant that he was on the verge of refusing the part in the picture "Fired Wife" because he was unhappy about the selection of the director and the cast of the picture. It is not true that on April 3, 1943 or at any other time plaintiff informed defendant that he would not do the part in the picture "Fired Wife" because

he was seriously thinking of signing up with the Civil Air Patrol, or the army, for the duration of the war. It is true that on or about April 5, 1943, plaintiff informed defendant that he had made up his mind not to do the picture. It is not true that on or about April 5, 1943, or at any other time, plaintiff informed defendant that he made up his mind not to do the role of "Hank" in the picture "Fired Wife" or not to do the said picture because he felt it was his duty to give 100% of his time to war work and that he was signing up with the Civil Air Patrol for the duration.

It is true that for approximately one year prior to April 5, 1943, defendant was aware of the fact that plaintiff was a flyer and devoted part of his time to the Civil Air Patrol and upon a number of occasions officers and employees of defendant had observed plaintiff wearing the uniform of the Civil Air Patrol on the premises of defendant.

It is not true that on April 13th defendant informed plaintiff's exclusive agent, personal representative and lawyer, Oscar Cummins, that defendant had theretofore been informed by plaintiff personally that he, plaintiff, was going to join or had joined the Civil Air Patrol for the duration. It is true that on or about April 13, 1943, defendant informed said Oscar Cummins that plaintiff had informed defendant that he would not report for [353] his role in the production of the photoplay "Fired Wife" and that plaintiff did fail, refuse and neglect to report on April 12, 1943 pursuant to defendant's telegram of April 10 or otherwise and that defendant informed said Oscar Cummins that in order to establish a clear position defendant intended to suspend plaintiff from the payroll as of that date and it is true that said Oscar Cummins acted in the capacity of plaintiff's exclusive agent, per-

sonal representative and lawyer and at said time informed defendant that such action was proper, that he said Oscar Cummins was sick at the situation also that he had talked to plaintiff on the preceding night and was trying to get him to come in for further discussion with Speers and Muhl, and that if plaintiff did not he understood that defendant would have to suspend plaintiff but that he the said Oscar Cummins suggested that the problem could be solved by having another director assigned to the picture and that he would like to straighten it out. It is not true that defendant advised said Oscar Cummins that it had been informed by plaintiff that he was going to join or had joined the Civil Air Patrol for the duration and would not for that reason report for the production of the photoplay "Fired Wife" and it is not true that said Oscar Cummins said in response to said statement of defendant that such action was entirely proper and that he the said Oscar Cummins was endeavoring to have plaintiff come into defendant's studio to discuss the situation with defendant's assistant secretary and casting director.

III.

It is not true that as a direct result or any result of plaintiff's representations and/or conduct as alleged in defendant's answer and/or any of its amendments or as a direct result or any result of any plaintiff's representations and/or conduct defendant believed that it was plaintiff's intention to devote 100% of his time to the Civil Air Patrol or to the U. S. Army or other [354] similar pursuits other than his obligations under the contract and would not report to defendant under the terms and provisions of said contract or report to the defendant at all and it is not true that defendant believed it would be a useless and idle act to make plans and expend money for

the preparation of productions and roles in which plaintiff's unique and artistic talent would fit and it is not true that defendant believed it would be a useless and idle act to offer further roles to plaintiff until plaintiff informed defendant that he had changed his plans or was willing to comply with the terms and conditions of his contract. It is true that on the expiration of May 19, 1943, the suspension of plaintiff by reason of his failure, refusal and neglect to report to the studio on April 12, 1943 had terminated, and that defendant did, after the expiration of the 19th day of May, 1943, have full and complete right to require plaintiff to perform his obligations under his contract and that upon the expiration of said 19th day of May, 1943, plaintiff's rights to compensation under said contract were fully restored.

IV.

It is not true that defendant relied on the representations or conduct of plaintiff as set forth and alleged in its answer and/or any of the amendments thereto, and that because of said alleged representations and/or conduct, defendant did not make plans and did not expend money for the preparation of productions and roles in which plaintiff's unique and artistic talents would fit, or that defendant did not prevent further roles to plaintiff. It is not true that plaintiff acted or relied upon the said alleged representations or conduct of plaintiff or that to protect its rights, defendant under the contract served and delivered the notice of May 18, 1943. It is true that on or about May 18, 1943, defendant did serve upon and deliver to plaintiff a written notice as alleged in paragraph III of the first cause of action of plain- [355]

tiff's complaint, and it is true that upon the termination of May 19, 1943, the services of the substitute employed by defendant to take the place of plaintiff for the portrayal of the role of "Hank" in the production of the photoplay entitled "Fired Wife" were completed.

V.

It is not true that plaintiff had knowledge of any of the matters or things set forth and alleged by defendant in its answer, and/or any of the amendments thereto in respect of the alleged misrepresentations and/or conduct of plaintiff, and it is not true that plaintiff had any knowledge of any kind that defendant was at all times ready, willing, able or anxious to use plaintiff's services so that defendant might fulfill its obligations under the contract. It is true that plaintiff did believe from and after May 26, 1943, that defendant did not care to use his services and desired to keep plaintiff off of defendant's payroll for an indefinite period of time. It is not true that the demands of plaintiff for compensation were designedly or in bad faith made to the employees of defendant, and it is true that the demands for compensation made by plaintiff and on behalf of plaintiff were made to employees of defendant who had the authority and were empowered in the regular course of business to make payment of compensation to plaintiff earned by plaintiff under the contract between the dates May 20 and May 22, 1943, both inclusive. It is not true that the executive officers of defendant empowered to make payment or authorize payment of compensation to plaintiff were not aware of the demand for compensation made by plaintiff. On the contrary it is true that defendants and its duly authorized executive officers had notice of such demands for compensation.

VI.

It is not true that after April 5, 1943, the defendant did not know that plaintiff was holding himself available [356] or in readiness to perform all of his obligations under the contract or that the defendant did not know that plaintiff was at all times ready, willing, able and anxious to perform his services under said contract and to receive pay therefor, except that it is true as hereinbefore already found that plaintiff did advise defendant that he would not perform the role of "Hank" in the production of the photoplay "Fired Wife." At all times after April 5, 1943, defendant did have notice that plaintiff was willing to perform all of the services which defendant could require plaintiff to perform under the contract, except the role of "Hank" in the production of the photoplay "Fired Wife," and that on and after May 19, 1943, defendant had notice that plaintiff was ready, willing, able and anxious to perform all services that could be legally required from him by defendant under the contract.

VII.

It is not true that before plaintiff served the written notice of May 29, 1943, upon defendant as alleged in paragraph VIII of plaintiff's first cause of action, or that on May 27 and May 28, 1943, or at any other time, that plaintiff acting through his exclusive agent, personal representative and lawyer, or otherwise, did lull or continue to lull defendant into the belief and reliance that plaintiff was not holding himself available for services under his contract and was not demanding or expecting compensation as required by his contract, and it is not true that plaintiff through said exclusive agent, or otherwise, specifically or otherwise informed defendant, among other

things, or at all, that plaintiff was engaged in work in connection with the establishment of an air shuttle service and that if anyone wanted plaintiff, they would have to see General Arnold of the Army Air Corps to get him or that plaintiff, through said exclusive agent, or otherwise, made any statement whatsoever which could in any manner whatsoever, directly or indirectly, assert or [357] suggest to defendant that plaintiff was not ready, willing and able to perform all services that might be required of plaintiff under said contract.

VIII.

It is not true that at no time since April 10, 1943, did plaintiff intend to fulfill the terms and obligations of said contract (except in so far as the performance of the role of "Hank" in the photoplay "Fired Wife," as hereinbefore already found) or that at all times since said date plaintiff was devoting all his time to the Civil Air Patrol and as instructor for the Army Air Force Cadets at Mira Loma Flying Academy, Seventh Army Air Forces Flying Training Detachment at Oxnard, California, or in any other branch of the armed forces. It is true that for some months prior to April 10, 1943, defendant was attached to said Civil Air Patrol as a flyer and as an instructor with the full knowledge of defendant. It is also true that there was nothing in plaintiff's attachment to said service which prevented plaintiff from fulfilling for defendant the duties and obligations required of plaintiff under said contract. It is true that since July 16, 1943, plaintiff has been a member of the Air Force Reserve of the United States Army, but it is not true that by reason of said membership, plaintiff was at any time after July 16, 1943, in any way prevented or prohibited from performing his duties as required under said

contract. It is true that defendant has asserted a desire to respect any patriotic motive or desire on the part of plaintiff to serve his country and it is true that defendant has manifested its said respect and desire by raising no objection to the time devoted by plaintiff in the service of the Civil Air Patrol for many months prior to April 12, 1943, and has raised no objection to such time as plaintiff has devoted to the service of the Civil Air Patrol, or any other branch of the military activities of the United States of America, since April 12, 1943. [358]

IX.

It is not true that plaintiff is wholly without equity because of any of the facts alleged in defendant's answer, or any of the amendments thereto or otherwise, to invoke the aid of the court to terminate and rescind plaintiff's obligations to perform said contract. On the contrary, it is true that defendant is wholly without equity to invoke the aid of this court to prevent the termination and cancellation of said contract by plaintiff by reason of the default and conduct of the defendant as herein found.

X.

It is true that defendant has offered to fully pay and restore to plaintiff any sums of money or compensation that the court may find to be due to plaintiff by virtue of any mistake of fact, mistake of law, or for any other reason which may be shown to exist by the facts. It is also true that this offer of defendant was not interposed until a lapse of more than six months after the agreement had been broken and plaintiff had given notice of the termination thereof, and that throughout said period, to wit, from the date of plaintiff's notice to the date of the pleading of said defense, defendant had and has insisted

both that it was not obligated to pay plaintiff any compensation, and also that the agreement was still in effect and prohibited him from working for anyone else. Said offer to do equity was also conditioned upon the court first deciding that the money or compensation became due to plaintiff on or after May 26, 1943, and that only in the event that the court found such money to be due from defendant to plaintiff was defendant willing to do equity. The court in addition finds that defendant's failure and refusal to pay compensation to plaintiff on May 26, 1943, was not the result of mistake of fact, mistake of law, unavoidable accident, fraud, surprise or ignorance, but on the contrary finds that said refusal to pay was arbitrary and unwarranted. [359]

XI.

It is not true that plaintiff is estopped to claim a breach of the contract on the part of defendant.

XII.

It is not true that prior to or at the time of plaintiff's refusal to report to defendant at its studio on April 12, 1943, plaintiff had notified defendant to the effect that he had determined to devote 100% of his time to war work or particularly that he had signed up with the Civil Air Patrol for the duration of the war, and that as a consequence thereof he would not engage in the work of making motion pictures for the duration of the war.

XIII.

It is not true that from time to time from April 5, to May 28, 1943, inclusive, or at any other time, plaintiff, either in person or through his agent, represented to defendant, directly or indirectly, that he, the said plaintiff, expected to join the military service for the duration of

the war and that as a consequence of plaintiff's said desire, plaintiff would not report at defendant's studio to portray the role of "Hank" in the photoplay "Fired Wife" or for any other purpose, or that plaintiff continued as late as May 28 to lull defendant into the belief, personally or through any agent, directly or indirectly, that he was not available for services under the contract, and that on the contrary he was and would be engaged in work of a military character and that he did not intend to fulfill his obligations under the contract.

XIV.

It is not true that plaintiff was not available at all times continuously from May 19 to May 29, 1943, both inclusive, to perform such services as defendant might require plaintiff to perform under the contract. On the contrary, it is true that plaintiff was available continuously during all of said times to [360] respond to any proper notice which might have been served by defendant to perform for defendant such services as defendant might require of plaintiff under said contract.

XV.

It is true that on many occasions during the period of months prior to April 1943 and on a number of occasions after April 1943 that by reason of plaintiff's affiliation and participation in the operations of the Civil Air Patrol, plaintiff was frequently outside of the County of Los Angeles; it is also true, however, that all of plaintiff's activities in connection with the Civil Air Patrol were had with the knowledge, consent and encouragement of defendant and that such activities in no way interfered with the obligations of plaintiff to render services to defendant in accordance with the terms of the contract.

Conclusions of Law

Based upon the foregoing Findings, the Court makes the following Conclusions of Law:

I.

An actual controversy did exist between the parties in respect of the rights and obligations of said parties arising out of the contract dated November 21, 1938, as amended.

II.

Plaintiff committed a breach of said contract on April 12, 1943, and as a consequence of said breach defendant had the right to suspend plaintiff from April 12, 1943 for and during such period as was required for some person other than plaintiff to portray the role of "Hank" in the photoplay entitled "Fired Wife," and defendant had the further right to extend the period of plaintiff's contract for the period of said suspension and the further right to refuse to pay to plaintiff any compensation during the period of said suspension, to wit, the period required [361] by some other person to portray the role of "Hank" in the photoplay "Fired Wife."

III.

The period required for some person other than plaintiff to portray the role of "Hank" in "Fired Wife" was the period between April 12, 1943 and May 19, 1943, and plaintiff was therefore properly suspended for a period of five (5) weeks and two (2) days and defendant was within its rights in refusing to pay to plaintiff compensation for a period of five (5) weeks and two (2) days, and had the right to extend the term of plaintiff's existing contract for a period of five (5) weeks and two (2) days.

IV.

Defendant had actual notice and knowledge of plaintiff's activities with the Civil Air Patrol for several months prior to April, 1943, and from April, 1943 to and including the completion of the active trial of the within entitled action, and consented to and approved such activities, and the activities of plaintiff with the Civil Air Patrol during the period of several months prior to April, 1943 and thereafter did not interfere with the rendition of plaintiff's services to defendant in accordance with the contract.

V.

Plaintiff was engaged in no activities, military or otherwise, which interfered with the full and proper performance of his duties and obligations to defendant under the terms of the contract.

VI.

Defendant did not serve a written notice upon plaintiff on April 10, 1943 or at any other time to appear at the studios of defendant on April 12, 1943 at the hour of 10 o'clock A. M. for the purpose of portraying the role of "Hank" in a photo- [362] play to be produced entitled "Fired Wife." Defendant did, prior to April 10, 1943, and on or about April 10, 1943 orally give notice to plaintiff to appear at the studios of defendant on April 12, 1943 at the hour of 10 o'clock A. M. for the purpose of portraying the role of "Hank" in a photoplay to be produced entitled "Fired Wife" and plaintiff received said oral notice.

VII.

Defendant did not, on April 10, 1943, at any time prior to April 10, 1943, or at any time after April 10,

1943, serve notice upon plaintiff, written or otherwise, requiring plaintiff to appear at the studios of defendant in Los Angeles, California, at the hour of 10 o'clock A. M. on April 12, 1943, or at any other time for the purpose of rendering services to defendant other than portrayal of the role of "Hank" in the photoplay "Fired Wife" as defendant might rightfully require of plaintiff under the contract.

VIII.

There was no failure, refusal, or neglect upon the part of plaintiff to report to defendant for the rendition of his services at any time between April 10 and May 29 other than the failure, refusal and neglect of plaintiff to report to defendant on April 12, 1943 for the purpose of portraying the role of "Hank" in a motion picture production entitled "Fired Wife."

IX.

Upon the termination of plaintiff's suspension of five (5) weeks and two (2) days commencing from April 12, 1943, to wit: on May 19, 1943, plaintiff under the contract was on May 20, 1943 automatically restored to his rights under said contract and entitled to compensation, including and after said date.

X.

Plaintiff was at all times during the period immediately prior to April 1943 to and including May 29, 1943, [363] ready, willing, and able to render his services to defendant as required by said contract, except that plaintiff was not ready or willing to render his services to defendant for the purpose of portraying the role of "Hank" in the motion picture production entitled "Fired Wife."

XI.

There was no obligation upon plaintiff under the terms of the contract to make any statements to defendant upon the termination of his suspension by reason of his refusal to play the role of "Hank" in the motion picture production "Fired Wife" prior thereto or at any other time to state to defendant that he was ready, willing and able to perform services for defendant under said contract.

XII.

It was defendant's obligation under said contract if it desired to use the services of plaintiff to give notice to plaintiff of its said desire and in the absence of any such notice there was no duty upon plaintiff to assert to defendant the readiness, willingness or ability of plaintiff to render services.

XIII.

Plaintiff had the right to collect compensation under said contract from and after May 19, 1943 to and including May 29th pursuant to the terms of said contract and defendant was obligated to pay such compensation.

XIV.

Plaintiff did make a demand for a part of said compensation, to wit, compensation for the days of May 20 to 22 both inclusive on May 26, 1943 and defendant, contrary to the provisions of said contract, did not meet said demand and did not pay said compensation nor did anyone pay said compensation on defendant's behalf. Under the terms of said contract, a demand by plaintiff for said compensation was not necessary, and defendant [364] was obligated to pay plaintiff under the terms of said contract from and after May 19, 1943, without any demand for such payment by plaintiff.

XV.

Defendant's refusal to pay to plaintiff compensation with or without a demand by plaintiff on May 26, 1943, for the days of May 20, 21 and 22 and thereafter for the week of May 22 to May 29th, was unwarranted and arbitrary and constituted a breach of the contract in its substantial and material terms.

XVI.

There was no estoppel created against plaintiff nor was there an anticipatory breach of said contract by plaintiff by reason of the alleged statements purportedly made by plaintiff to defendant's agents that plaintiff intended to devote 100% of his time to war work, particularly to sign up with the Civil Air Patrol for the duration of the war, and defendant did not have the right to and in fact did not refuse to pay compensation to plaintiff by reason of said alleged statements, and defendant did not have the right to and in fact did not fail and refuse to pay plaintiff compensation or suspend plaintiff or extend the term of said contract by reason of said alleged statements.

XVII.

There was no estoppel created against plaintiff and in favor of defendant by reason of plaintiff's alleged statements and conduct from April 5, 1943 to May 28, 1943 to the effect that he would join the military service for the duration of the war, and would not report at defendant's studio to portray any role in which he might be cast by defendant, and defendant did not refuse to and did not pay compensation to plaintiff or suspend plaintiff or extend the term of said contract by reason of said alleged statements and/or its belief or reliance thereon. [365]

XVIII.

Defendant was not misled or lulled into any sense of security by plaintiff by any alleged representation or conduct of plaintiff or by anything said or done by plaintiff directly or indirectly and plaintiff is not estopped to terminate said contract by reason of any averments made by defendant in its answer as amended or in any separate defenses pleaded or asserted by defendant; and defendant did not fail to pay plaintiff compensation or suspend the services of plaintiff or extend the term of the contract by reason of being misled or lulled into a sense of security by plaintiff or by reason of any of the averments made by defendant in its answer as amended or in any of the separate defenses pleaded or asserted by defendant.

XIX.

Said contract between plaintiff and defendant did not require the continuous physical presence of plaintiff in Los Angeles County in order for plaintiff to be available to defendant, and plaintiff was at all times mentioned in the pleadings fully available to defendant under the terms and provisions of said contract. Plaintiff's temporary absence from Los Angeles County while rendering services for the Civil Air Patrol was with the knowledge and consent of defendant and did not interfere with plaintiff's availability to defendant.

XX.

Defendant is not entitled to any relief by reason of its alleged offer to do equity and defendant has not in fact made any offer to do equity which has any legal or equitable or moral persuasiveness.

XXI.

Defendant's conduct in refusing to pay compensation to plaintiff on and after May 26, 1943 in accordance with the terms of said contract was calculated, arbitrary and unwarranted and was not [366] the result of mistake, unavoidable accident, fraud, surprise, or ignorance, and was not predicated upon any of the alleged representations of plaintiff as set forth in defendant's answer as amended or as separate and distinct defenses in its answer and amendments thereto, or adduced in the form of evidence at the time of trial.

XXII.

Plaintiff is entitled to a termination of said contract as of May 29, 1943.

XXIII.

Plaintiff is entitled to a judgment for compensation earned by plaintiff under said contract for the period from May 20, 1943 to May 29, 1943, both dates inclusive, at the rate provided for in said contract, to wit: \$2,250.00.

XXIV.

Plaintiff is entitled to his costs of suit.

Let Judgment Be Entered Accordingly.

Dated, Los Angeles, California, August 24, 1944.

H. A. Hollzer
Judge

[Endorsed]: Filed Aug. 24, 1944. [367]

In the District Court of the United States
Southern District of California
Central Division

No. 3242-H

ROBERT CUMMINGS,

Plaintiff,

vs.

UNIVERSAL PICTURES COMPANY, INC.,
a corporation,

Defendant.

UNIVERSAL PICTURES COMPANY, INC.,
a corporation,

Cross-Complainant,

vs.

ROBERT CUMMINGS,

Cross-Defendant.

JUDGMENT

Heretofore and on January 4, 1944, the above entitled action came on regularly for trial before the Honorable Harry A. Hollzer in the above entitled court, sitting without a jury, plaintiff being present in person and by his counsel, Roth & Brannen by Lester Wm. Roth and Joseph J. Cummins, and defendant being present by its counsel, Loeb & Loeb by Grant Cooper, and it having been stipulated at the outset of the trial by the parties through

their respective counsel that the primary issues for decision were comprised within the first and second causes of action of plaintiff's complaint and the answer of defendant as [368] amended and that if the court should decide said causes of action in favor of plaintiff that it would be unnecessary to try the fourth cause of action, and the third cause of action having been dismissed by plaintiff, and it further having been stipulated by the parties through their respective counsel that the motion for summary judgment heretofore made by plaintiff and the motion for injunction pendente lite heretofore made by defendant need not be argued or presented, and counsel for defendant having stated in open court that the motion for injunction pendente lite was moot and plaintiff having stated that the motion for summary judgment would of necessity be decided by the trial of said first and second causes of action, and it having been thereupon decided by said court that said motions and each of them go off calendar and said trial having been heard from day to day on January 4, 5, 6, 7, 10 and 11th and evidence both oral and documentary having been submitted on behalf of each of said parties and the matter having been fully argued by counsel for the respective parties, orally and in briefs, and having thereupon been submitted to the court for its decision and said court now being fully advised in the premises, and the Court having made its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Ordered, Adjudged, Decreed and Declared:

(1) The written contract between plaintiff and defendant dated November 21, 1938, as amended, is declared terminated as of the expiration of the working day of May 29, 1943. and said contract as amended is declared as of said date to be cancelled and of no force and effect and not binding upon either plaintiff or defendant after May 29, 1943. [369]

(2) Plaintiff have judgment against defendant for the sum of \$2,250.00, and his costs of suit incurred herein, in the amount of \$70.45.

Dated, Los Angeles, California, August 24, 1944.

H. A. Hollzer
Judge

Judgment entered Aug. 24, 1944. Docketed Aug. 24, 1944. C. O. Book 27, page 446. Edmund L. Smith, Clerk, by L. Wayne Thomas. Deputy Clerk.

[Endorsed]: Filed Aug. 24, 1944. [370]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL.

Defendant and cross-complainant (herein sometimes referred to as "defendant") moves the Court to set aside the Findings of Fact and Conclusions of Law and Judgment made and entered in the above entitled cause on the 24th day of August, 1944, and to grant defendant a new trial on the grounds:

1. That the judgment is contrary to law, in this:

(a) At the time of bringing said action, for [371] a long time prior thereto, and at all times since, plaintiff and cross-defendant (sometimes herein referred to as "plaintiff") was in default under the terms of the contract alleged in plaintiff's complaint, and had repudiated said contract, and had not retracted such repudiation; and

(b) Defendant had not committed any breach, or any material breach, of said contract.

2. The evidence is insufficient to justify the decision, in this:

(a) There is no substantial evidence to justify the termination or rescission of the contract alleged in plaintiff's complaint.

(b) The evidence shows, without conflict, (1) that at the time of bringing said action, for a long time prior thereto, and at all times since, plaintiff was in default under the terms of the contract alleged in plaintiff's complaint, and had repudiated said contract, and had not retracted such repudiation; and (2) that defendant had not committed any breach, or any material breach, of said contract.

(c) There is no substantial evidence to show that any of the alleged breaches of said contract on the part of defendant were, or are, material breaches.

(d) There is no substantial evidence to show that defendant breached, or threatened to breach, any of the conditions of said contract to be performed by defendant.

(e) There is no substantial evidence to show that plaintiff had performed, or had offered to perform, the duties and obligations on his part to be performed under said contract. [372]

(f) There is no substantial evidence to show that defendant waived any of its rights under said contract.

This motion is made upon the pleadings, records, files, proceedings, evidence, and reporter's transcript of the testimony in the above entitled cause.

Wherefore, defendant prays that an order may be entered in said cause setting aside the Findings of Fact and Conclusions of Law and the Judgment made and entered in said cause, and that a new trial of the issues in said cause may be had, and for such further, and different relief as may be proper.

Dated September 1, 1944.

JOSEPH L. LEWINSON
LOEB & LOEB

By Joseph L. Lewinson

[Endorsed]: Filed Sep. 1, 1944. [373]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS,

Judge Hollzer's Calendar,
October 30, 1944

Defendant has moved for a new trial. In its Memorandum of Points and Authorities filed in support of said motion, defendant's counsel have stressed three points. In a prefatory statement in said memorandum, counsel assert "we shall ask the Court particularly to consider these questions:—

"Was plaintiff, who without color of right and under aggravating circumstances breached his contractual duty to play the role of 'Hank' in 'Fired Wife,' entitled to receive \$250.00 a day after the completion of that production and until he might properly be directed to play a similar role in [398] a like production, in order that he might have an opportunity again to breach his contract; and was he entitled to carry on such a course of conduct for a period of five years, to the end that he might do no work but nevertheless collect \$250.00 a day during intervals between pictures? Is an affirmative answer to this question required, even though at the time of plaintiff's breach he announced that he would again breach his contract if he were properly required by defendant in the future, pursuant to the contract, to perform a role in a picture similar to 'Fired Wife,' or any other role in any other picture, under a director of defendant's choice? After breaching and renouncing this contract, was plaintiff entitled to rescind it even though defendant failed to

make compensation available to plaintiff, although plaintiff had not recanted or notified defendant he would perform in the future."

The three main points presented in defendant's memorandum are the following:

Firstly, counsel contend, "Having himself breached the contract, plaintiff is not entitled to rescind, even though defendant might have committed subsequent breaches."

Secondly, it is claimed, "Plaintiff is not entitled to rescind, because he repudiated the contract by refusing to work for the duration and also by refusing to work except on conditions not in the contract." [399]

Lastly, it is urged, "Assuming defendant were in default, plaintiff still would not be entitled to rescind the contract."

If the questions and the contentions above quoted were justified by and were relevant to the facts of this case, as established by the record, we would not hesitate to analyze and discuss the same at length. However, as we appraise the record and the inferences which fairly may be drawn therefrom, the facts out of which the action at bar has arisen differ materially from those included among the basic assumptions upon which the above quoted questions and contentions necessarily rest.

For example, the Court made no finding—nor do we believe such finding ought to have been rendered—to the effect that plaintiff refused "to play the role of 'Hank' in 'Fired Wife'," so as to be "entitled to receive \$250.00 a day after the completion of that production and until he might properly be directed to play a similar role in a like production, in order that he might have an opportunity again to breach his contract."

Again, no finding was made—and we are satisfied that no finding ought to have been reached—to the effect that plaintiff threatened or intended “to carry on such a course of conduct for a period of five years, to the end that he might do no work but nevertheless collect \$250.00 a day during intervals between pictures.”

Likewise, no finding was made—and we believe that no finding ought to have been made—to the effect that plaintiff “announced that he would again breach his contract if he were properly required by defendant in the future, pursuant to the contract, to perform a role in a picture similar to ‘Fired Wife,’ or any other role in any other [400] picture, under a director of defendant’s choice.”

Furthermore, no finding was made—and we are persuaded that no finding ought to have been entered—to the effect that prior to defendant’s default arising from the fact that “defendant failed to make compensation available to plaintiff.” (Defendant’s default amounted to more than a mere failure; it was an intentional refusal to pay the compensation due to plaintiff), the latter had given notice “renouncing this contract,” or that at any time he had performed or omitted any act, as a consequence of which he should have “notified defendant he would perform in the future.”

In a rather comprehensive memorandum of conclusions filed subsequent to the submission of this cause, we endeavored to set forth the salient features of the record, including admissions made at various stages of the proceeding. A reading of said memorandum should make it clear that we disagree with defendant’s conception of the facts in important particulars therein pointed out.

In support of defendant's contentions counsel have cited decisions arising out of facts differing materially from those which we have found have been established in the instant suit. In none of the cases cited did the contract construed therein contain provisions analogous to those comprising the essential terms of paragraph twelve of the contract involved herein. Nor did the facts in any of said actions disclose that the parties had pursued a course of conduct applying and construing the agreement similar to the course which the litigants here had followed.

In the aforementioned memorandum of conclusions we pointed out that according to the evidence which we regard as credible the only obligation which plaintiff refused to [401] perform was to portray the role of "Hank" in the photoplay "Fired Wife." The provisions of said paragraph twelve, so far as pertinent here, specified that in the event of plaintiff's refusal to perform any of his obligations, defendant had the right to terminate said contract, or, at its option, refuse to pay plaintiff any compensation during the period of such refusal and to extend the term of said agreement and all of its provisions for a period equivalent to all of the period during which such refusal continued, provided that if at the time of such refusal plaintiff had been cast to portray a role in a photoplay and should another person be engaged to portray such role, then defendant had the right to refuse to pay plaintiff any compensation until the completion of such role by such other person.

Furthermore, as pointed out in said memorandum of conclusions, plaintiff's dispute with defendant's representative arose primarily out of the latter's repudiation of certain verbal promises and representations he had made to the former respecting the director and the cast to be selected for the production of the photoplay "Fired Wife," in which plaintiff had been scheduled to portray the leading male role. When he contended that defendant's agent should live up to said promises and representations and when plaintiff's agent urged that the dispute could be adjusted by the defendant assigning an outstanding director to direct the production of said photoplay, the latter insisted, so to speak, upon holding plaintiff to the strict letter of his bond. Under the contract, defendant could take the strict legal position that plaintiff was obligated to "perform and render his services * * * * * conscientiously and to the full limit of his ability," and also that while it was a perfectly natural and indeed laudable ambition on his part to seek to portray [402] leading roles in photoplays directed by an outstanding director and in which other principal parts would be portrayed by outstanding artists in the motion picture industry, nevertheless, said agreement was silent respecting any obligation on defendant's part relative to any promises or representations of the character aforementioned. In other words, when plaintiff insisted that defendant fulfill the promises made by its agent, the latter, in effect, replied after the manner of a famous character in Shakespeare's "Merchant of Venice"—"I cannot find it; 'tis not so in the bond."

In the final analysis, as we construe the record before us, by his efforts to compel defendant's representative to comply with said promises and representations, plaintiff was doing his utmost in good faith to insure the successful production of the photoplay "Fired Wife." While, no doubt, such success would have enhanced his prestige as an actor, it is equally clear that the same might well have redounded to the defendant's benefit, financially and otherwise. Under such circumstances, we cannot construe plaintiff's conduct as an attempt to injure defendant or to terminate said contract or to breach any of his obligations thereunder, much less as constituting bad faith.

Again, as stated in said memorandum of conclusions, under the facts as the Court has found them to be—and as we believe virtually conceded by defense counsel during one of the oral arguments—plaintiff's refusal to portray the role of "Hank" did not accord to his employer both "the right to extend the term of this agreement and all of its provisions" and, in addition, the further right to refuse to pay any compensation to him during the period ensuing upon the completion of said role by the person engaged to portray the same. [403]

To plaintiff, as we pointed out in said memorandum of conclusions, defendant's obligation to pay him compensation was the most important provision of this agreement. Defendant's refusal to pay the same was deliberate and intentional. In adopting that course defendant acted at its peril. By such refusal and default on its part, defendant gave to plaintiff the correlative right to terminate

said contract. He availed himself of that right and notified defendant to that effect.

Finally, we desire to add that in our view of the record defendant's attack upon plaintiff's good faith and upon his patriotism is clearly without merit. With respect to his good faith, the comments heretofore made should suffice. As to plaintiff's patriotism, the evidence abundantly established—indeed, there was not a scintilla of proof to the contrary—that long before the controversy in suit arose plaintiff had become an experienced, competent airplane pilot; that he had volunteered for enlistment as a pilot in the Armed Forces of our country, but had been rejected solely because of his age, and that having been barred from the latter service he was doing his next best by serving as a member of the Civil Air Patrol, more particularly by instructing others how to pilot an airplane. In addition, he had volunteered to serve overseas as an actor in the presentation of the programs conducted under the auspices of U. S. O. Camp Shows, but had been prohibited from so doing through no fault of his own.

Upon the record, therefore, as we understand it, we see no escape from the conclusions announced in the findings and judgment heretofore rendered. Accordingly, we hold that defendant's motion for a new trial should be denied.

Copies to counsel.

[Endorsed]: Filed Oct. 30, 1944. [404]

At a stated term, to-wit: The September Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 30th day of October in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable Harry A. Hollzer, District Judge.

No. 3242-H

Robert Cummings,

Plaintiff,

vs.

Universal Pictures Co., Inc., a corporation,

Defendant.

Universal Pictures Co., a corp.,

Cross-Complainant,

vs.

Robert Cummings,

Cross-Defendant.

For the reasons set forth in the Memorandum of Conclusions this day filed, it is ordered that defendant's motion for a new trial be, and the same is, denied. [405]

[Title of District Court and Cause.]

NOTICE OF APPEAL.

Notice is hereby given that Universal Pictures Company, Inc., a Corporation, defendant and cross-complainant in the above entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment [406] entered in this Court on August 24, 1944.

Dated November 15th, 1944.

LOEB & LOEB

JOSEPH L. LEWINSON

By Joseph L. Lewinson

Attorneys for said Defendant and Cross-Complainant.

Names and Addresses of Attorneys:

Roth and Brannan, 621 South Hope Street, Los Angeles 14, California. Joseph J. Cummins, 739 South Hope Street, Los Angeles 14, California, Attorneys for Plaintiff and Cross-Defendant.

Loeb & Loeb, 523 West Sixth Street, Los Angeles 14, California. Joseph L. Lewinson, 621 South Hope Street, Los Angeles 14, California, Attorneys for Defendant and Cross-Complainant.

[Endorsed]: Filed & mailed copy to Roth & Brannan, and Joseph J. Cummins, attorneys for plaintiff, Nov. 15, 1944. [407]

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND.

Know All Men By These Presents, that we, Universal Pictures Company, Inc., a Corporation, as principal, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Robert Cummings in the full and just sum of Two Thousand Seven Hundred Fifty Dollars (\$2,750.00), to be paid to the said Robert [408] Cummings, his heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our successors, or assigns, jointly and severally by these presents.

Sealed with our seals, and dated this 13th day of November, 1944.

Whereas, on August 24, 1944, a judgment was rendered in the above entitled Court in favor of said Robert Cummings and against said Universal Pictures Company, Inc., a Corporation, and the said Universal Pictures Company, Inc., a Corporation, has appealed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit;

Now, the condition of the above obligation is such that if the said Universal Pictures Company, Inc., a Corporation, shall prosecute said appeal with effect, and satisfy the said judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs,

interest, and damages as the appellate court may adjudge and award, then the above obligation to be void, otherwise to remain in full force and virtue.

UNIVERSAL PICTURES COMPANY, INC.

By H. T. Brewster

Assistant Treasurer

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND

By W. M. Walker

W. M. Walker,

Attorney in Fact. (Seal)

Attest Theresa Fitzgibbons

Theresa Fitzgibbons,

Agent.

State of California

County of Los Angeles—ss:

On this 13th day of November, 1944, before me, S. M. Smith, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared W. M. Walker, known to me to be the Attorney-in-Fact, and Theresa Fitzgibbons, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity

and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

(Seal)

S. M. SMITH

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires February 18, 1946.

The foregoing bond is hereby approved, and is to stand as a supersedeas until the final determination of the appeal.

Dated November 15, 1944.

BEN HARRISON
United States District Judge.

Examined and recommended for approval as provided in Rule 8.

LOEB & LOEB
JOSEPH L. LEWINSON
By Donald Armstrong
Attorneys for Defendant and Cross-Complainant.

[Endorsed]: Filed Nov. 15, 1944. [409]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 421 inclusive contain full, true and correct copies of Complaint for Declaratory and Other Relief; Answer; Order for Removal to Federal Court and Stay of Proceedings; Certificate of Clerk of Superior Court; Order to Show Cause; Cross-Complainant's Memorandum of Points and Authorities on Application for Temporary Injunction; Counterclaim; Affidavit of Robert Speers; Letter dated October 29, 1943 to Clerk from Roth and Brannan; Answer to Counterclaim; Notice of Motion for Summary Judgment; Affidavit of Robert Cummings re Preliminary Injunction; Affidavit of Oscar R. Cummins; Affidavits of B. W. Steinberg, Daniel J. Kelley, Herman D. Cook, H. S. Brewster and Ivan Betts on Application for Injunction and Against Motion for Judgment; Affidavit of Edward Muhl; Supplementary Affidavit of Oscar R. Cummins in Support of Motion for Judgment and Against Application for Injunction; Affidavit of Bella Marco in Support of Motion for Judgment and Against Application for Injunction; Affidavit of James A. Smith in Support of Motion for Judgment and Against Application for Injunction; Affidavit of Oscar R. Cummins in Response to Affidavit of Edward Muhl; Points and Authorities in Opposition to Motion for Permission to File Amendment to Answer; Amendment to

Answer; Stipulation of Facts; Memorandum of Conclusions dated December 31, 1943; Proposed Second Amendment to Answer; Plaintiff's Trial Memorandum of Points and Authorities and its Objections to the Proposed Second Amendment to Defendant's Answer; Appendix to Plaintiff's Trial Memorandum of Points and Authorities; Supplemental Trial Brief; Answer to Plaintiff's Supplemental Trial Brief; Plaintiff's Exhibits 1 to 3 inclusive; Defendant's Exhibits A to E inclusive; Memorandum of Conclusions dated March 6, 1944; Minute Order Entered March 6, 1944; Objections and Amendments to Proposed Findings and Judgment; Answer to Objections and Amendments to Plaintiff's Proposed Findings and Judgment; Notice of Motion for Order of Dismissal and Judgment on the Pleadings; Plaintiff's Points and Authorities in Opposition to Motions to Dismiss and for Judgment on the Pleadings; Memorandum of Conclusions dated August 21, 1944; Minute Order Entered August 21, 1944; Findings of Fact and Conclusions of Law; Judgment; Motion for New Trial; Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for New Trial; Memorandum in Support of Motion for New Trial; Memorandum of Conclusions dated October 30, 1944; Minute Order Entered October 30, 1944; Notice of Appeal; Supersedeas and Cost Bond; Defendant's Statement of Points on Appeal; Defendant's Designation of Contents of Record on Appeal; Plaintiff's Designation of Additional Contents of Record on Appeal which, together with Original Reporter's Transcripts transmitted

herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$58.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 19 day of December, 1944.

[Seal]

EDMUND L. SMITH,
Clerk.

By Theodore Hocke,
Chief Deputy Clerk.